SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 295

UNITED STATES OF AMERICA, APPELLANT,

vs.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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PLACITA

(Omitted in printing)

[File Endorsement Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 55 CR 607

(Section 1252(d), Title 8, United States Code)

UNITED STATES OF AMERICA

vs.

GEORGE I. WITKOVICH,

also known as

JURI ISADOR WITKOVICH

INDICTMENT—filed November 3, 1955

The October 1955 Grand Jury charges:

That on or about September 14, 1954, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

GEORGE I. WITKOVICH,

also known as JURI ISADOR WITKOVICH,

the defendant, who was then and there an alien against whom an order of deportation theretofore had issued and been outstanding more than six months, which said order of deportation was then and there a final order, having become final under administrative process on June 25, 1953, and whose departure from the United States under the order of deportation had not been effected within such six-month period, and who was then and there, pending eventual deportation subject to supervision, who was then and there required to and did appear before an officer of the Immigration and Naturalization Service, and who was then and there required to give information under oath as to his nationality, circumstances, habits, associates and activities, as pre-

scribed by the provisions of the Immigration and Nationality Act of 1952 (Title 8, United States Code, Section 1252 (d) (3)) and Section 242.3 (c) (3), Title 8, Code of Federal Regulations, as amended, did willfully fail to answer and reply to the following questions, to wit,—

4 (a) Q. Do you subscribe to the Daily Worker?

(b) Q. Mr. Witkovich, can you read in any other language other than Slovene and English?

(c) Q. Since the order of supervision was entered on March 4, 1954, have you at any time visited the office of the "Narodny Glasnik", 1413 West 18th Street, Chicago, Illinois?

(d) Q. Since the order of supervision was entered on March 4, 1954, Mr. Witkovich, have you ever visited the offices of the Bohemian publication "Nova Dova" or the Slovakian publication "Ludovy Noviny", 1510 West 18th Street, Chicago, Illinois?

(e) Q. Do you know the editor of the "Narodni Glasnik"?

(f) Q. Do you know Leo Fisher?

(g) Q. Do you know Anton Minerich?

(h) Q. Do you know Nick Rajkovich?

(i) Q. Do you know Arsenio Bartl?

(j) Q. Do you know John Zuskar?

(k) Q. Do you know Calvin Brook?

(l) Q. Since the order of deportation was entered in your case on June 25, 1953 have you attended any meeting of the Communist Party of the U.S.A.?

(m) Q. Since the order of supervision was entered on March 4, 1954 have you attended any meeting of any organization other than the singing club?

(n) Q. Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case, since the order of deportation was entered June 25, 1953?

(o) Q. Have you distributed petitions or leaflets published by the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case since the order of deportation was entered June 25, 1953?

5-7 (p) Q. Since the order of supervision have you attended any meetings or lectures at the Peoples

Auditorium, 2457 West Chicago Avenue, Chicago, Illinois?

(q) Q. Since the order of supervision was entered against you have you attended any meetings or socials at the Chopin Cultural Center, 1547 North Leavitt Street, Chicago?

(r) Q. Have you attended any movies since your order of supervision was entered at the Cinema Annex, 3210 West Madison Street, Chicago?

(s) Q. Are you acquainted with an individual named Irving Franklin?

(t) Q. Are you now a member of the Communist Party of U.S.A.?

(u) Q. Are you now or have you ever been a member of the Slovene American National Council?

(v) Q. Are you now or have you ever been a member of the United Committee of South Slavic Americans?

: in violation of Section 1252(d), Title 8, United States Code.

A TRUE BILL:

JOHN GAVERAS,
Foreman

R. TIEKEN,
United States Attorney

8 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS INDICTMENT—filed December 12, 1955

Now comes George I. Witkovich, defendant in the above entitled cause, and moves the court to dismiss the indictment herein for the following reasons:

1. Said indictment does not charge a crime under the laws of the United States.

2. Mere failure or refusal to answer questions is not a crime under any law known to Anglo-American jurisprudence.

3. Failure to answer questions as they appear in the indictment does not denote criminal conduct and cannot form the basis of a criminal prosecution.

4. Said indictment does not show that said final order of

deportation was based on a fair hearing nor does it show that the order is based on reasonable, substantial and probative evidence as required by statute.

5. Said indictment does not show that due process was had by the defendant in the deportation hearing on which the deportation order is based.

6. Said indictment does not show how or why the defendant's departure from the United States under the order of deportation had not been effected within a six month period.

7. Said indictment does not show that said order of deportation had not been effected through any fault of the defendant.

8. Said indictment does not show to which country the defendant was ordered deported.

9. Said indictment alleges an order of deportation was entered against the defendant on June 25, 1953, and shows no further action by the government to enforce said deportation order, nor why said deportation had not been effected.

10. Said indictment does not specify under what law, if any, the defendant is deportable, or under what law he was ordered deported.

11. Said indictment does not show under what paragraphs of section 1251 (4) the defendant was ordered deported.

12. Said indictment is violative of due process in that by virtue of section 1252 (a), (b), (1), (2), (3), (4), (c) (a) Title 8, U.S.C. it deprives the defendant of his right to a jury trial and the requisite forms of criminal procedure in that it delegates to an administrative body or purports to delegate to an administrative body the determination of the issue of deportation and the determination of the essential elements of a criminal offense allegedly arising from the determination of the issue of deportability, the commission of which alleged offense subjects the defendant to imprisonment in the penitentiary and the deprivation of his liberty and property.

13. Said indictment avers an order of deportation which is a mere administrative proceeding without the well recognized and long established protective devices guaranteed to persons accused of crime, and therefore cannot legally form the basis of a criminal prosecution resulting in denial of liberty.

14. The indictment is vague, uncertain and ambiguous and does not meet the requirements of the first, fifth and sixth amendments to the constitution.

15. The indictment does not set forth the terms and provisions of the alleged order of deportation or the substance thereof.

16. The indictment does not state facts sufficient to constitute a description of the offense which it purports or alleges to charge.

17. The indictment does not show that the alleged order of deportation was served on the defendant nor that he had notice or knowledge of the terms and the provisions thereof.

18. Said indictment does not allege that the defendant is an alien resident in the United States contrary to law.

19. Said indictment is based on a law and the various sections thereof which are unconstitutional and void.

20. The alleged order of deportation and the alleged supervision of the defendant as prescribed by the Immigration & Nationality Act, Title 8 U.S.C., section 1252 (d) (e) are civil orders and cannot be enforced by criminal process.

11 21. The statutory requirements and the regulations and restrictions placed upon the conduct and activities of the defendant are unconstitutional, invalid, illegal and void, they are unreasonable and an abuse of power and contrary to the first, fifth, sixth, ninth and tenth amendments to the constitution.

22. The statute is invalid on its face as a violation of procedural due process under the fifth amendment, in that it makes the administrative decision conclusive on the criminal trial court and permits the administrative decision to control the criminal trial court without a jury or the full measure of criminal proof. The criminal consequences attached to a deportation order by the statute, as aforesaid, render it as applied to the defendant, a bill of attainder and ex post facto law in violation of Article I, section 9.

23. The statute and the administrative regulations provide for, and the orders impose, restrictions upon the defendant's liberty under circumstances where the power to deport cannot be carried out. The power to detain an alien or to substitute conditions restrictive of his liberty may exist

constitutionally only as an incident to and in aid of the power to deport or to exclude.

24. Section 1252 (d) Title 8 U.S.C. does not permit inquiry into the correctness or validity of the order. Under it a deportation order is made to carry potential criminal consequences and the administrative decision upon the issue of unlawful presence is made conclusive upon the criminal trial court, thus permitting this vital element of a crime to be established without a jury trial.

12

25. Adjudication that the defendant is subject to deportation is not made by procedures constitutional for judgment of crime, and the government cannot be permitted to use the result as a conclusive determination of that fact in a criminal proceeding.

26. Section 242.3 (c) (3) Title 8, Code of Federal Regulations as amended, is not authorized by Section 1252 (d) Title 8 U.S.C. and is an assumption of power not authorized by law, and is an abuse of any power delegated to the attorney general under section 1252 (d) 8 U.S.C.

27. The Act does not permit the court or jury which tries the defendant for this crime to pass on the illegality of his presence in the United States, or on the legality of the order of deportation.

28. Section 1252 (d), Title 8 U.S.C. unlawfully delegates legislative power in that the section establishes no policy or rule or principle to limit or guide the attorney general in framing regulations which constitute his supervision of aliens. Here there is an attempt to make criminal acts which are non-criminal, to wit, failure to answer questions, and to impose punishment for failure to speak, beyond the penalties prescribed by congress.

13-14

29. Section 1252 (d) Title 8 U.S.C. on its face is so vague and indefinite as to permit the imposition of restrictions of protected liberties, and as applied to the defendant by the orders of supervision, impose restrictions on the defendant's rights under the first, fourth and fifth amendments.

30. The restrictions imposed upon the conduct and activities of the defendant by section 242.3 (c) (3) Title 8, Code of Federal Regulations, as amended, are unreasonable, unauthorized, are an assumption of power not delegated by

the Act and are in violation of 8 U.S.C. 1252 (d) and of the fifth, sixth, ninth and tenth amendments to the constitution.

Respectfully submitted,
PEARL M. HART,
Attorney for Defendant

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30 N. La Salle St.
Chicago 2, Illinois
Phone: STate 2-3213

15 IN THE UNITED STATES DISTRICT COURT

No. 55 CR 607

UNITED STATES OF AMERICA

vs.

GEORGE I. WITKOVICH,
also known as
JURI ISADOR WOTKOVICH

MEMORANDUM—February 15, 1956

This is an indictment under Title 8 U.S.C. §1252 (d), which reads:

"(d) Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) *to give information under oath as to his nationality, circumstances, habits, associations, and activities,* and *such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper;* and (4) to conform to such reasonable written restrictions on his conduct

or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or *willfully fail to* appear or to *give information* or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction *be guilty of a felony*, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both." (Underscoring added)

A motion to dismiss the indictment, attacking the constitutionality of the statute, is now before the court. The charge is that defendant violated clause (3), underlined above, in that he willfully failed to answer certain questions which are set forth in the indictment. There is no allegation that he refused to appear, to submit to a medical or psychiatric examination, or to submit to reasonable restrictions on his conduct; these requirements are not, therefore, directly involved, although incidental consideration of them is necessary.

The parties agree that this Act is an exercise by Congress of the power of the United States as a sovereign state to deal with aliens within its territory (*Carlson v. Landon*, 342 U.S. 524 (1952); *United States v. Tandaric*, 152 F.2d 3, 5 (C. A. 7, 1946; cert. den 327 U.S. 786)). To be upheld, it must constitute a valid delegation of that power to the Attorney General, in terms definite enough to form a standard of guidance for his conduct (*Winters v. New York*, 333 U.S. 507, 515 (1947); *Lichter v. United States*, 334 U.S. 742, 786 (1948)). Whether it does or not can be determined only by an examination of the section in its context: Title 8 U.S.C.A. 1251 *et. seq.*, and the cases which have interpreted those sections. Section 1251 provides that any alien in the United States shall be deported upon the order of the Attorney General for causes there set forth; section 1252(b) prescribes the procedure for the entry of such an order. Pending determination of deportability, an alien may in the discretion of the Attorney General be continued in custody, or released on bond or conditional parole (Section 1252(a)), The Attorney General's discretion under this section is not

unlimited, but may be reviewed by the courts to determine whether he acted reasonably (*U. S. v. Shaug-nessy*, 212 F.2d. 128 (C.A. 2, 1954); *U. S. v. Holton*, 205 F.2d 228, 230 (C.A. 7, 1953); *Ocon v. Landon*, 218 F.2d 320, 324 (C.A. 9, 1954)). After the entry of a final deportation order,
17 the Attorney General is given six months within which to "effect the alien's departure", during which the alien may be detained or released on bond. (Sec. 1252(c)). The alien must be released from detention sooner than six months if it appears that there is no reasonable possibility of his being deported in the forseeable future (*U. S. v. District Director of Immigration*, 117 F. Supp. 541 (S. D. N. Y., 1953); *U. S. ex. rel Cefalu v. Shaughnessy*, 117 F. Supp. 473 (S. C. N. Y., 1954)). Although this subsection provides that after the six-months period, if deportation has not been effected, the alien "shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section", it has been held that "and detention" is surplusage, the period of detention must terminate after six months, and the alien thereafter be subject only to such detention as may result from a violation of the supervision provisions of subsection (d)(3). (*U. S. ex. rel Youw v. Shaughnessy*, 102 F. Supp. 799, 801 (S.D. N.Y., 1952); *U. S. ex. rel Blankenstein*, 177 F. Supp. 699 (S.D. N.Y., 1953)). The last-named section is the one here considered, and has been quoted in full; the regulations are in substantially the language of the statute. Subsection (2) provides that wilfull refusal or failure to depart after an immigration order is final shall be a felony; Section 1253 relates to the countries to which the Attorney General shall deport the aliens.

It is apparent from this summary of the deportation procedure that after the entry of a final order of deportation, the sole remaining power and duty of the Attorney General is to make sure that the alien departs from the country. It follows that the powers of supervision given him are
18 intended as an aid in enforcing this power by making certain that the alien will be available for deportation when and if the time comes that this is possible. Clauses (1), (2), and (4) of the same subsection are reasonably calculated to fulfill this purpose. Clause (1), requiring the alien to submit himself for identification is clearly helpful to that

end; the requirement of physical examinations might be necessary to deportation to a particular country; and in (4), "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case", the word "reasonable" may be read as "those restrictions which tend to guarantee his availability for deportation". The same may be said of clause (3), of immediate concern here: "to give information * * * as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper". This must be read to mean such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes.

The Government urges that the Attorney General may, under this section, question the alien to determine not only his availability for deportation, but also to satisfy himself that the activities for which the alien was ordered deported are not continuing. There is no warrant for such an interpretation, since the Attorney General is powerless to take any further action even if they are continuing. A deportation order is not a magic incantation, but a finding that the alien is, for one reason or another, an undesirable resident of this country. Further, it is an order entered in
19 a civil proceeding, in which proof is by "clear and convincing" evidence, rather than beyond a reasonable doubt (*Schneiderman v. United States*, 320 U.S. 118 (1943)), in which counsel need not be appointed (*U. S. v. Vander Jagt*, 133 F. Supp. 676 (W.D. Mich., 1955)), and hearsay evidence may be admitted (*Navarette-Navarette v. Landon*, 22 3 F.2d 234 (C.A. 9, 1955)).

There is accordingly no justification for allowing a deportation order to accomplish more than its intended purpose. It establishes, in a hearing adequate for this end, that the alien shall depart this country and nothing more. The Attorney General has been given power to supervise the alien to make sure he is available for deportation, and no further power. If, after the entry of the order, the alien engages in activity punishable under the Criminal Code, the Attorney General is at liberty to bring him before a Grand Jury and move for an indictment in the usual way. If he is

not engaging in such activity, and if it is physically impossible to deport him, and if increasing numbers of aliens in this situation has created a serious problem, then Congress may solve it by giving some official definite and measurable power to deal with the dilemma. So far it has not done so, except to the extent that it has given the Attorney General the powers of supervision here considered.

This discussion has dealt with most of the objections urged by the defendant. He also urges that the statute creates a crime by legislative fiat, leaving the court nothing to do but to pronounce sentence in a summary proceeding (*Wong Wing v. United States*, 163 U.S. 228, 236 (1896)), and that procedural due process has been violated. That is not the case when the statute is correctly interpreted. The court will determine the relevancy of the questions by a definite standard: do they assist the Attorney General in making certain that the alien will be available for deportation.

Defendant also contends that the statute here considered violates the First Amendment guarantee of freedom of speech, of which freedom of silence has been assumed to be a part (*United States v. O'Conner*, 135 F. Supp. 590 (D.C., 1955), and cases cited page 596). However, speech may be compelled by Congress, and silence punished, when special circumstances warrant restrictions on traditional freedoms. Thus Title 2 U.S.C. Sec. 192 making it an offense punishable by fine or imprisonment to fail to answer proper questions asked by Congressional committees has been upheld (*In Re Chapman*, 166 U.S. 661, 672 (1896); *United States v. Bryan*, 339 U.S. 323, 327 (1949)). Under this statute, however, questions must be relevant to the Congressional power to legislate (*Quinn v. United States*, 349 U.S. 155, 162 (1955); *Watkins v. United States*, C.A., D.C., 1/26/56, 24 L.W. 2329), just as in the instant case they must relate to the valid power of the Attorney General.

The motion to dismiss the indictment is overruled.

PHILIP L. SULLIVAN,
Judge

Dated: February 15, 1956

[File endorsement omitted.]

22 IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

MOTION FOR CLARIFICATION OF COURT'S RULING DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT—filed February 28, 1956

Now comes the United States of America by R. Tieken, United States Attorney for the Northern District of Illinois, and moves the Court for clarification of its ruling on Defendant's Motion to Dismiss, and in support thereof respectfully represents:

That in a Memorandum of Opinion announced February 15, 1956, the Court has denied defendant's motion to dismiss the indictment herein; that in its memorandum the Court has rejected the Government's contention that under the statute involved, Section 242(d)(3) of the Immigration and Nationality Act of 1952 (8 USC 1252(d)(3)), the Attorney General may question aliens ordered deported on matters other than their availability for deportation; that questions constituting the gravamen of the crime have been specifically set forth in the indictment and challenged by defendant's motion to dismiss (Point 1), which alleges that the
23 "indictment does not charge a crime under the laws of the United States"; that the aforesaid motion directly attacks the legality of the questions set forth in the indictment and calls for a ruling under the law announced in the Court's Memorandum of Opinion;

WHEREFORE, it is respectfully prayed:

(1) That the Court allow oral argument directed to the sufficiency of the indictment; and

(2) That the Court rule on the legality of the questions alleged in the indictment and state whether or not the Government is entitled to introduce evidence that the questions were propounded and that the defendant did willfully fail to reply as alleged in the indictment.

R. TIEKEN
United States Attorney

24 [File Endorsement Omitted].

25 IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

ADDITIONAL AND SUPPLEMENTAL MOTION TO DISMISS INDICTMENT FILED BY LEAVE OF COURT

—filed March 8, 1956

Now comes the defendant, GEORGE I. WITKOVICH, by Pearl M. Hart, his attorney, and in addition to the reasons heretofore given to the court for his motion to dismiss the indictment, all of which reasons are again urged herein, the defendant respectfully moves the court to dismiss the indictment herein for the following reasons:

1. The indictment does not charge a crime under the statute in question, or any other statute, because the questions it is alleged the defendant wilfully failed to answer have no bearing on, or relevancy to the statute, and have no relevancy to the defendant's availability for deportation.

2. The questions asked relate to constitutionally protected rights of peaceful assembly, association, freedom of speech and press, and none of the questions have any bearing upon defendant's availability for deportation.

26 3. The questions have no relationship to any rights which the attorney general lawfully has under the statute, are unreasonable and an abuse of power by the attorney general, and are contrary to the first, fifth, sixth, ninth, and tenth amendments to the Constitution.

4. Section 1252(d) Title 8 U.S.C. establishes no policy or rule or principle to limit or guide the attorney general in requiring the defendant to answer questions put to him by the attorney general; the section is therefore subject to grave abuse, and the defendant has no way of knowing in advance of prosecution for alleged crime what rights are given the attorney general under the section in question, nor what questions it would be appropriate for the attorney general to ask or for the defendant to answer.

Following are the questions which the indictment alleges the defendant failed to answer:

(a) Do you subscribe to the Daily Worker?

(b) M. Witkovich, can you read in any other language other than Slovene and English?

(c) Since the order of supervision was entered on March 4, 1954, have you at any time visited the office of the Narodny Glasnik, 1413 W. 18th St., Chicago, Illinois?

(d) Since the order of supervision was entered on March 4, 1954, Mr. Witkovich, have you ever visited the offices of the Bohemian publication "Nova Dova" or the Slovakian publication "Ludovy Noviny", 1510 West 18th St., Chicago, Illinois?

(e) Do you know the editor of the Narodni Glasnik?

(f) Do you know Leo Fisher?

(g) Do you know Anton Minerich?

27 (h) Do you know Nick Rajkovich?

(i) Do you know Arsenio Bartl?

(j) Do you know John Zuskar?

(k) Do you know Calvin Brook?

(l) Since the order of deportation was entered in your case on June 25, 1953, have you attended any meeting of the Communist Party of the U.S.A.?

(m) Since the order of supervision was entered on March 4, 1954, have you attended any meeting of any organization other than the singing club?

(n) Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case, since the order of deportation was entered June 25, 1953?

(o) Have you distributed petitions or leaflets published by the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case since the order of deportation was entered June 25, 1953?

(p) Since the order of supervision have you attended any meetings or lectures at the Peoples Auditorium, 2457 W. Chicago Ave., Chicago, Illinois?

(q) Since the order of supervision was entered against you have you attended any meetings or socials at the Chopin Cultural Center, 1547 North Leavitt St., Chicago?

(r) Have you attended any movies since your order of supervision was entered at the Cinema Annex, 3210 W. Madison St., Chicago?

(s) Are you acquainted with an individual named Irving Franklin?

(t) Are you now a member of the Communist Party of the United States?

(u) Are you now or have you ever been a member of the Slovene American National Council?

(v) Are you now or have you ever been a member of the United Committee of South Slavic Americans?

28 It is obvious that none of these questions has any relevancy to the defendant's availability for deportation.

For further reasons to dismiss the indictment, the defendant asks the indulgence of the court to again call attention to the following objections heretofore made to the indictment:

(a) No order of deportation is set out in the indictment;

(b) Nothing is alleged as to the authority by which said order of deportation was issued;

(c) It is not alleged that the defendant had notice of said order of deportation;

(d) Nor is it alleged under what sections of the Nationality Act of 1952 the defendant was found deportable.

(e) Because of the absence of these vital elements in the indictment the indictment is vague and uncertain. It contains no allegation which can be identified with any particular order of deportation which the government may introduce in evidence, and the defendant is therefore not advised of what he is to meet in his defense.

(f) Said indictment is violative of due process in that it deprives the defendant of his right to a jury trial in that it delegates to an administrative body the determination of the issue of deportation, which is a vital element in the instant criminal proceeding.

(g) Criminal consequences attached to a deportation order render the law as applied to the defendant, a bill of attainder and ex post facto law in violation of Article I, section 9.

29 The defendant reiterates and incorporates herein reasons 1 to 30 inclusive, of his motion to dismiss the indictment heretofore filed herein.

WHEREFORE, the defendant respectfully moves the court to dismiss the indictment herein for the reasons heretofore asserted.

Respectfully submitted,

GEORGE I. WITKOVICH
Defendant
By PEARL M. HART
His Attorney

PEARL M. HART
Attorney for Defendant
30 N. La Salle Street
Chicago 2, Illinois
STate 2-3213

30 [File Endorsement Omitted].

31 IN THE UNITED STATES DISTRICT COURT

No. 55 CR 607

UNITED STATES OF AMERICA

vs.

GEORGE I. WITKOVICH,
also known as
JURI ISADOR WOTKOVICH

MEMORANDUM—May 10, 1956

This is an indictment under Title 8 U.S.C. Sec. 1252 (d), which reads:

"(d) Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) *to give informa-*

tion under oath as to his nationality, circumstances, habits, associations, and activities, and *such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper;* and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or *wilfully fail to* appear or to *give information* or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be *guilty of a felony,* and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both." (Underscoring added)

32 A motion to dismiss the indictment, attacking the constitutionality of the statute, is now before the court. The charge is that defendant violated clause (3), underlined above, in that he wilfully failed to answer certain questions which are set forth in the indictment. There is no allegation that he refused to appear, to submit to a medical or psychiatric examination, or to submit to reasonable restrictions on his conduct; these requirements are not, therefore, directly involved, although incidental consideration of them is necessary.

The parties agree that this Act is an exercise by Congress of the power of the United States as a sovereign state to deal with aliens within its territory (*Carlson v. Landon,* 342 U.S. 524 (1952); *United States v. Tandaric,* 152 F. 2d 3, 5 (C.A. 7, 1946; cert. den. 327 U.S. 786)). To be upheld, it must constitute a valid delegation of that power to the Attorney General, in terms definite enough to form a standard of guidance for his conduct (*Winters v. New York,* 333 U.S. 507, 515 (1947); *Lichter v. United States,* 334 U.S. 742, 786 (1948)). Whether it does or not can be determined only by an examination of the section in its context: Title 8 U.S.C.A. 1251, *et. seq.,* and the cases which have interpreted

those sections. Section 1251 provides that any alien in the United States shall be deported upon the order of the Attorney General for causes there set forth; section 1252(b) prescribes the procedure for the entry of such an
33 order. Pending determination of deportability, an alien may in the discretion of the Attorney General be continued in custody, or released on bond or conditional parole (Section 1252(a)). The Attorney General's discretion under this section is not unlimited, but may be reviewed by the courts to determine whether he acted reasonably (*U.S. v. Shaughnessy*, 212 F. 2d 128 (C.A. 2, 1954); *U.S. v. Holton*, 205 F.2d 228, 230 (C.A. 7, 1953); *Ocon v. Landon*, 218 F. 2d 320, 324 (C.A. 9, 1954)). After the entry of a final deportation order, the Attorney General is given six months within which to "effect the alien's departure," during which the alien may be detained or released on bond. (Sec. 1252(c)). The alien must be released from detention sooner than six months if it appears that there is no reasonable possibility of his being deported in the foreseeable future (*U.S. v. District Director of Immigration*, 117 F. Supp. 541 (S.D. N.Y., 1953); *U.S. ex rel Cefalu v. Shaughnessy*, 117 F. Supp. 473 (S.D. N.Y., 1954)). Although this subsection provides that after the six-months period, if deportation has not been effected, the alien "shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section," it has been held that "and detention" is surplusage, the period of detention must terminate after six months, and the alien thereafter be subject only to such detention
34 as may result from a violation of the supervision provisions of subsection (d) (3). (*U.S. ex rel Youw v. Shaughnessy*, 102 F. Supp. 799, 801, (S.D. N.Y., 1952); *U.S. ex rel Blankenstein*, 177 F. Supp. 699 (S.D. N.Y., 1933)). The last-named section is the one here considered, and has been quoted in full; the regulations are in substantially the language of the statute. Subsection (2) provides that wilfull refusal or failure to depart after an immigration order is final shall be a felony; Section 1253 relates to the countries to which the Attorney General shall deport the aliens.

It is apparent from this summary of the deportation procedure that after the entry of a final order of deportation,

the sole remaining power and duty of the Attorney General is to make sure that the alien departs from the country. It follows that the powers of supervision given him are intended as an aid in enforcing this power by making certain that the alien will be available for deportation when and if the time comes that this is possible. Clauses (1), (2), and (4) of the same subsection are reasonably calculated to fulfill this purpose. Clause (1), requiring the alien to submit himself for identification, is clearly helpful to that end; the requirement of physical examinations might be necessary to deportation to a particular country; and in (4), "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case," the word "reasonable" may be read as "those restrictions which tend to guarantee his availability for deportation." The same may be said of clause (3), of immediate concern here: "to give information * * * as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." This must be read to mean such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes.

The Government urges that the Attorney General may, under this section, question the alien to determine not only his availability for deportation, but also to satisfy himself that the activities for which the alien was ordered deported are not continuing. There is no warrant for such an interpretation, since the Attorney General is powerless to take any further action even if they are continuing. A deportation order is not a magic incantation, but a finding that the alien is, for one reason or another, an undesirable resident of this country. Further, it is an order entered in a civil proceeding, in which proof is by "clear and convincing" evidence, rather than beyond a reasonable doubt. *U.S. ex rel Vajtauer v. Com'r, 273 U.S. 103*, in which counsel need not be appointed (*U.S. v. Vander Jagt*, 133 F. Supp. 676 (W.D. Mich., 1955)), and hearsay evidence may be admitted (*Navarette-Navarette v. Landon*, 223 F. 2d 234 (C.A. 9, 1955)).

There is accordingly no justification for allowing a depor-

tation order to accomplish more than its intended purpose. It establishes, in a hearing adequate for this end, that the alien shall depart this country and nothing more. The Attorney General has been given power to supervise the alien to make sure he is available for deportation, and no further power. If, after the entry of the order, the alien engages in activity punishable under the Criminal Code, the Attorney General is at liberty to bring him before a Grand Jury and move for an indictment in the usual way. If he is not engaging in such activity, and if it is physically impossible to deport him, and if increasing numbers of aliens in this situation has created a serious problem, then Congress may solve it by giving some official definite and measurable power to deal with the dilemma. So far it has not done so, except to the extent that it has given the Attorney General the powers of supervision here considered.

This discussion has dealt with most of the objections urged by the defendant. He also urges that the statute creates a crime by legislative fiat, leaving the court nothing to do but to pronounce sentence in a summary proceed-
37 ing (*Wong Wing v. United States*, 163 U.S. 228, 236 (1896)), and that procedural due process has been violated. That is not the case when the statute is correctly interpreted. The court will determine the relevancy of the questions by a definite standard: do they assist the Attorney General in making certain that the alien will be available for deportation?

Defendant also contends that the statute here considered violates the First Amendment guarantee of freedom of speech of which freedom of silence has been assumed to be a part (*United States v. O'Connor*, 135 F. Supp. 590 (D.C., 1951), and cases cited page 596). However, speech may be compelled by Congress, and silence punished, when special circumstances warrant restrictions on traditional freedoms. Thus Title 2 U.S.C. Sec. 192 making it an offense punishable by fine or imprisonment to fail to answer proper questions asked by Congressional committees has been upheld (*In re Chapman*, 166 U.S. 661, 672 (1896); *United States v. Bryan*, 339 U.S. 323, 327 (1949)). Under this statute, however, questions must be relevant to the Congressional power to legislate (*Quinn v. United States*, 349 U.S. 155, 162 (1955); just

as in the instant case they must relate to the valid
38 power of the Attorney General).

The motion to dismiss the indictment is overruled. February 15, 1956.

After the announcement of the foregoing opinion, new motions and briefs were filed by both parties.

Defendant filed a "Supplemental Motion to Dismiss Indictment." His argument in support of this motion in part re-iterates objections previously considered by the court. He contends that the indictment is vague and uncertain in that it fails to set forth the order of deportation, the authority by which, or the sections under which it was made, or that the defendant had notice of it. These objections must be overruled. The indictment is in the language of the statute and sufficiently notifies the defendant of the charge which he must meet. Several other objections urged were dealt with in the original memorandum, but have been re-considered, and are overruled. The Court adheres to its original opinion that the statute, as construed, is not unconstitutional.

The government's brief in answer to this Supplemental Motion to Dismiss is devoted to the presentation of additional material in support of its original contention that the statute gives the Attorney General power to question a deportable alien about matters other than his availability
for deportation. This additional information has
39 been carefully considered and found not to be convincing. The theme of the government's argument appears to be that to let deportable aliens roam the country unsupervised would create a very dangerous situation. The Court is of the same opinion. As the previous memorandum indicated, Congress quite correctly gave the Attorney General power to make certain of the alien's whereabouts at all times. To this end, under the statute here considered, the Attorney General could properly ask, and enforce his right to receive answers to, questions as to the alien's place of residence, whether he owns his home or rents, where he works and how long he has worked there, whether he is married and lives with his wife, and an endless list of inquiries along the same line. This power is quite sufficient

to ensure that the alien will not be without supervision. To hold that the statute intended to give an official the unlimited right to subject a man to criminal penalties for failure to answer absolutely any question the official may decide to ask would raise very serious constitutional questions. The Court accordingly reiterates that the power given to the Attorney General by the statute in question is to enforce his right to question a deportable alien to make certain that the latter is holding himself available for deportation.

The defendant's motion asks that the Court now examine the questions set forth in the indictment, and dismiss
40 the indictment for the reason that it is apparent that none of them is related to his availability for deportation. Although there is no authority under this particular section, such a procedure is dictated by analogous situations in other fields. Thus it is the duty of the judge to rule on whether or not the privilege against self-incrimination has been properly claimed, and "To sustain the privilege, it need only be evident from the implications of the question, the setting in which it is asked, that responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result" (*Hoffman v. United States*, 341 U.S. 479, 489 (1950); quoted, *Emspak v. United States*, 349 U.S. 190, 199 (1954)). And in a prosecution for perjury, it is clear that the materiality of the questions asked is a question of law for the court (*Sinclair v. United States*, 279 U.S. 263, 298 (1929)); *United States v. Orman*, 207 F. 2d 148, 155 (1953), and that materiality "should appear from the face of the indictment" (*Markham v. United States*, 160 U.S. 319, 325 (1895)). Where the questions are not relevant on their face, but there is any probability that they could be shown to be relevant, it is proper to give the government an opportunity to make some sort of showing on the question (*Bowers v. United States*, 202 F. 2d 447, 449 (C.A., D.C., 1953); *United States v. Orman, supra*). However, where it appears from the indictment that the questions alleged are not even
41 probably material, the indictment should be dismissed. (*United States v. Garvett*, 35 F. Supp. 644, 646 (E.D. Mich., 1940); *United States v. Seymour*, 50 F. 2d 930, 940 (D. Neb., 1931); *United States v. Cameron*, 282 Fed. 684, 692 (D. Ariz., 1922)). Where it is perfectly apparent to

the trial judge from the face of the indictment that the questions set forth are irrelevant, the defendant will not be exposed to what would be a "mere ceremony of trial" (*United States v. Laut*, 17 F.R.D. 31, 36 (S.D., N.Y., 1955)).

In the present case, the government apparently agrees that a ruling on the questions now is the proper procedure in this case. In its brief in opposition to the motion to dismiss, it has not urged that the questions were relevant, but has confined itself to urging the court to reverse its previous position. Further, in a "Motion for Clarification" of the Court's previous memorandum, it has prayed "that the Court rule on the legality of the questions asked."

The law in analogous situations, reason, and the explicit request of both the government and defendant, thus dictate that I examine the questions set forth in the indictment. This examination is for the purpose of determining whether they are (a) clearly relevant, (b) possibly relevant, or (c) clearly irrelevant, to the matter of assisting the
42 Attorney General to make certain that the alien is available for deportation.

Of the twenty-two questions on which the indictment is based, many are so far afield as to require no discussion, since it is apparent at a glance that they are in no way relevant to this purpose. These are as follows:

> "Can you read in any other language than Slovene and English?"
>
> "Have you attended any meeting of any organization other than the singing club?"
>
> "Have you addressed any lodges of the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case * * *?"
>
> "Have you distributed petitions or leaflets published by the (above) Society seeking aid for you, in your behalf * * *?"
>
> "Since the order of supervision have you attended any meetings or lectures at the People's Auditorium * * *?"
>
> "* * * Have you attended any meetings or socials at the Chopin Cultural Center * * *?"
>
> "Have you attended any movies * * * at the Cinema Annex?"

"Are you now or have you ever been a member of the Slovene American National Council?"

"Are you now or have you ever been a member of the United Committee of the South Slavic Americans?"

There is no allegation which would shed any light on how these activities would in any way affect the probability of the alien's presenting himself to immigration officials when required to do so. The questions by themselves are
43 completely meaningless in this context.

The same may be said of ten other questions, eight of which are "Do you know John Doe?", and two "Have you visited the office of John Doe?" "We seriously doubt whether the 'Do-you-know-a-certain-person' question, without more, can ever be said to be pertinent for the purpose of a criminal prosecution under Sec. 192" (*Bowers v. United States, supra,* at page 447; see also *United States v. Auippa,* 102 F. Supp. 609, 613 (N.D., Ohio, 1950)).

The first question in the indictment is "Do you subscribe to the Daily Worker?" Quite aside from its obvious irrelevancy to availability for deportation, to subject a man to criminal penalties for failure to answer a question as to what he reads would be an apparent infringement of rights protected by the First Amendment.

The remaining two questions are "Have you attended any meetings of the Communist Party of the U.S.A.?", and "Are you now a member of the Communist Party of the U.S.A.?" It is apparent that an affirmative answer to this question would not indicate anything about whether or not the defendant was holding himself in readiness for deportation. Directly in point are the many cases which have held that whether or not a person is a member of the Communist Party, by itself, has no relationship to his fitness to be admitted to bail. The leading case is *Stack v. Boyle,*
44 342 U.S. 1, 5 (1951), in which the Court considered a motion for reduction of bail by persons indicted under the Smith Act. The only evidence offered by the Government was a showing that four persons previously convicted under that Act had forfeited bail. The Court found such a showing insufficient, remarking that "the fixing of bail for any individual defendent must be based

upon *standards relevant* to the purpose of *assuring the presence of that defendant.*" (Italics added).

A similar holding in *Christoffel v. United States,* 190 F. 2d 560, 567 (C.A., D.C., 1952) is explained in the following quotation:

> "The Government urges that the fact that Christoffel is a Communist and is active in party affairs renders unlikely his appearance when required to appear. • • • Moreover, even if it be assumed that (he) is a Communist and is actively engaged in Communist party affairs, this, without more, is not a proper ground for denial of bail. • • • In the instant case the present primary issue is whether Christoffel will, under the conditions of bail • • • make appearance before the court when required to do so."

The opinion then quotes from another bail case which reached the same result on the same reasoning, *Williamson v. United States,* 184 F. 2d 280, 284 (C.A. 2, 1950):

> "But the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the 45-46 bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day."

Another authority to the same effect is *United States* ex rel *Pirinsky v. Shaughnessy,* 184 F. 2d 280, 284 (C.A. 2, 1950).

Accordingly, while the defendant's contention that the Act is unconstitutional is overruled, the indictment will be dismissed for the reason that none of the questions there set forth is relevant to defendant's availability to deportation.

PHILIP L. SULLIVAN,
Judge

May 10th, 1956

47 IN THE UNITED STATES DISTRICT COURT

No. 55 CR 607

UNITED STATES OF AMERICA

vs.

GEORGE I. WITKOVICH,
also known as
JURI ISADOR WOTKOVICH

ORDER DISMISSING INDICTMENT—May 10, 1956

This cause coming on for ruling on defendant's motion to dismiss the indictment comes the United States by the United States Attorney comes also the defendant in person and by his counsel and the Court being fully advised and having filed a memorandum opinion it is

ORDERED that the motion to dismiss be and the same hereby is sustained and that the indictment be and the same hereby is dismissed.

48 [File Endorsement Omitted]

49 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 8, 1956

I. Notice is hereby given that the United States hereby appeals to the Supreme Court of the United States from the order entered May 10, 1956, dismissing the indictment which charged a violation of Section 242(d) of the Immigration and Nationality Act of 1952.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of docket entries
2. Indictment

3. Motion to dismiss the indictment filed December 12, 1955
50 4. Opinion and order of the district court of February 15, 1956
5. Motion for clarification of opinion
6. Additional supplemental motion to dismiss filed March 8, 1956
7. Opinion of the district court dated May 10, 1956
8. Order dismissing the indictment
9. Notice of Appeal and proof of service.

III. The following question is presented by this appeal.

Under Section 242(d) of the Immigration and Nationality Act of 1952, an alien against whom a final order of deportation has been issued but whose deportation has not been effectuated within six months of such final order is, pending eventual deportation, subject to supervision under regulations prescribed by the Attorney General which must include, *inter alia*, a condition requiring the alien "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." Failure to comply with the conditions of supervision constitutes a crime.

The question presented is whether an alien ordered deported for past membership in the Communist Party, who is subject to such an order of supervision, may be questioned concerning present membership in and activities on behalf of the Communist Party and other organizations,
51-52 and associations with particular individuals, so that willful failure to answer such questions constitutes a crime under Section 242(d), or whether the questioning authorized by the statute must relate only to the alien's availability for deportation.

R. TIEKEN,
United States Attorney
Northern District of Illinois
WILLIAM T. HART,
Assistant United States Attorney
Northern District of Illinois

June 1956.

53 [File Endorsement Omitted]

54 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD—Filed July 18, 1956

IT IS HEREBY STIPULATED by and between the United States of America and George I. Witkovich, also known as Juri Isador Witkovich, that there shall be included as a part of the record on appeal to the United States Supreme Court the following documents, true copies of which are attached hereto:

(1) Order of supervision served on the defendant on March 4, 1954, attached hereto:

(2) Sworn testimony given by the defendant herein on September 14, 1954, and attached hereto.

UNITED STATES OF AMERICA
By R TIEKEN,
United States Attorney
Northern District of Illinois
GEORGE I. WITKOVICH,
also known as
JURI ISADOR WITKOVICH
By PEARL M. HART,
Attorney

55 UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

CHICAGO, ILLINOIS

District File No. E-10-685

A. R. No. A-5-509-411

Date: March 4, 1954

ORDER OF SUPERVISION

In the case of GEORGE WITKOVICH, whose deportation in accordance with law was ordered on June 25, 1953.

Section 242(d) of the Immigration and Nationality Act provides:

"Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter

issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than 1 year, or both."

THEREFORE, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employ-

ment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) the 7th day of each month at (a.m.) (p.m.) to the Officer in
56 Charge of the Immigration and Naturalization Service at Room 905 New Post Office Bldg., Chicago, Illinois.

The written report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment, (f)

(5) That said alien shall report to
in person

(6) That said alien shall terminate and remain disassociated from membership in, if any, support or other activity if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization.

(7) That said alien shall refrain from associating with any person knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph above,*

(8) That said alien shall not violate Section 2385 of the "Smith" Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50, U. S. Code).

(9) That said alien shall not travel outside the State of Illinois nor 50 miles outside the City Limits of Chicago, Illinois.

* Par 7 Cont.—provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doc-

trines, policies, or activities of any of the organizations or activities mentioned in preceding subparagraph.

JOHN P. SWANSON, *Chief*
Border Patrol and
Deportation Branch
Chicago District

Chicago, Illinois

I, GEORGE WITKOVICH, hereby acknowledge that I have read and understand the terms of this order, a copy of which I have received. I further understand that failure to comply with the terms of this order or with any of the conditions of 242(d) of the Immigration and Nationality Act, will subject me to prosecution.

Z. J. REAM
Parole Officer
Rm 905 New Post Office Bldg.
Chicago, Ill.

(Alien's signature)
2153 South Lawndale
Chicago, Illinois

I, , hereby acknowledge that I understand the terms set forth above and hereby agree to furnish a written report each month to the Officer in Charge concerning the alien's name, registration number, current address, place of employment, associates, and organizational activities, and that I will immediately report any failure on the part of the alien to comply with the terms of the order or information coming to my attention which might indicate that the alien intends to abscond or otherwise violate this order.

Note: The subject refused to sign acknowledgement of this order therefore, it was read to him in the presence of the undersigned, this 4th day of March 1954.

——— ———,
Investigator
R. A. DENNER,
Patrol Inspector

57 UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE
CHICAGO, ILLINOIS

RECORD OF SWORN STATEMENT

In re: GEORGE WITKOVICH File No. E-10685

Present

Respondent ..... GEORGE WITKOVICH
Attorney for Respondent ..... PEARL M. HART
Investigator ..... LOUIS J. OSTERKORN
Stenographer ..... OLGA G. SANDBERG

Place: Room 926,
New Post Office Bldg.,
Canal & Van Buren Sts.,
Chicago, Illinois

Date: September 14, 1954

Language: English
Interpreter: None

Investigator OSTERKORN to respondent:

Q. Mr. Witkovich, you are informed that I am an investigator in the employ of the United States Immigration and Naturalization Service and am authorized by law to administer oaths in connection with the enforcement and administration of the immigration and nationality laws and regulations, I wish to question you today in accordance with Sections 242(d) and 242(e) of the Immigration and Nationality Act of 1952. Section 242(d) requires, among other things, that any alien against whom a final order of deportation has been outstanding more than six months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Among other regulations the alien is required to give under oath information as to his nationality, circumstances, habits, associates, activities and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper. Section 242(d) further provides that if the alien coming under this class fails to give such informa-

tion or gives false information with relation to the requirements of such regulations, then the alien shall, upon conviction, be guilty of a felony and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both. Section 242(e) declares that any alien against whom an order of deportation has been entered who wilfully fails or refuses to depart from the United States within six months from the date of the final order of deportation under administrative processes or who shall wilfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure shall, upon conviction, be guilty of a felony and shall be imprisoned for not more than ten years. Do you understand?

A. Yes.

58 Q. You are further warned, Mr. Witkovich, that any information you furnish here in this proceeding may be used against you in any criminal or civil proceeding the Government may wish to institute. Do you understand?

A. Yes.

Q. Further, at this proceeding you may be represented by counsel if you so wish. Do you wish to be represented by counsel?

A. Yes.

Investigator OSTERKORN to counsel:

Q. Will counsel please state her name, business address and telephone number?

A. Pearl M. Hart, 30 North LaSalle Street, Chicago. State 2-3213.

Investigator's note: Miss Pearl Hart, according to the records of this office, has entered her appearance as respondent's attorney and has been admitted to practice before the Board of Immigration Appeals and the Immigration and Naturalization Service.

Investigator OSTERKORN to counsel:

Q. Are you ready to proceed, Miss Hart?

A. Yes I am.

Investigator OSTERKORN to respondent:

Q. Will you please stand and be sworn? (Complies.) Do you solemnly swear that the testimony you are about to give

will be the truth, the whole truth and nothing but the truth, so help you God?

A. I do.

Q. What is your true and correct name?

A. George I. Witkovich.

Q. What does the "I" stand for?

A. Isadore.

Q. What was your name at birth?

A. Juri Isador Witkovich.

Q. Have you been known by any other names?

A. No.

Q. What is your present address?

A. 2153 South Lawndale Ave., Chicago. Telephone Crawford 7-0197.

Q. How long have you resided at that address?

A. It will be two years in February.

59 Q. With whom do you reside there?

A. My family. My wife Barbara and five children —George R., Carl D., Barbara R., Walter D. and Ralph E. Witkovich.

Q. Are all the children citizens of the United States?

A. Yes, they were all born here.

Q. Is your wife a citizen of the United States?

A. Yes.

Q. What is your nationality?

A. I don't know. That is a question I could not answer. I was born in the old Austrian-Hungarian Empire, and Yugoslavia came after I left.

Q. The country where you were born now is Yugoslavia?

A. Yes.

Q. Do you have your alien registration card with you?

A. You have it here.

Q. On March 4, 1954 an order of supervision was entered in your case and you were placed on supervised parole. The parole agreement, which you refused to sign, was read to you by Parole Officer Zeno J. Ream on March 4, 1954 and was witnessed by D. J. Shipma, investigator, and R. A. Denner, patrol inspector. Is that correct?

By Counsel HART:

A. The answer to that is "I don't know who witnessed it but it was witnessed by two persons. And the order of supervision was read to me."

Investigator OSTERKORN to respondent:

Q. Were you furnished with a copy of the order of supervision, form I-220-B, the original of which I now show you and your counsel?

A. Yes.

Investigator's note: Order of Supervision, form I-220-B, dated March 4, 1954, presented to counsel and respondent for inspection.

Q. Have you been reporting to this office regularly between the 1st and 10th of each month?

A. Yes, sir.

Q. When did you report in person last time?

A. Last Wednesday.

Q. Where are you employed?

A. Prosveta. 2657 South Lawndale Avenue, Chi-
60 cago.

Q. What is the telephone number there?

A. I don't know. I never use it.

Q. What is the "Prosveta"?

A. That is a newspaper.

Q. Is it a daily or weekly?

A. A daily—four dailies and a weekly. It is the organ of a fraternal organization.

Q. In what language is the "Prosveta" published?

A. Slovenian and English.

Q. What organization publishes this paper?

A. The Slovene National Benefit Society.

Q. Is that society known in Slovene as the "Slovenska Narodna Podporna Jednota"?

A. Yes.

Q. When did you start to work for them?

A. May 2, 1952.

Q. Have you a Social Security number?

A. Yes, but I do not know the number.

Q. What is your occupation there?

A. Proof reader.

Q. Do you do any translating work too?

A. Sometimes, in a pinch.

Q. Do you write any articles for "Prosveta"?

A. No.

Q. Have you ever written articles for it?
A. No.
Q. What is your salary there?
A. $83.00 a week.
Q. Who pay it?
A. The "Prosveta".
Q. How many hours do you work there, and days?
A. From 8-4 every day except Saturday and Sunday.
61 Q. Who is the editor there?
A. Frank Zaitz.
Q. Who are the associate editors?
A. They are not considered associate editors. They are just assistant editors.
Q. How many persons are on the personnel of the "Prosveta"?

By Counsel:

A. Mr. Osterkorn, I think the only thing in which you are interested is his place of employment, how much time he works there. I don't think he is in a position to answer as to the personnel. He is just a proof reader. He is accounting for himself and not anybody else.

Investigator Osterkorn to respondent:

Q. What is the policy of that paper?

By Counsel:

A. That is objected to as having no bearing upon this even if he knows, and I shall advise him not to answer anything except with reference to himself.

Investigator Osterkorn to counsel:

Q. I will have to overrule your objection.
A. I don't care. He still won't answer.

Investigator Osterkorn to respondent:

Q. I shall ask you again, Mr. Witkovich. Is it an independent paper?

By Counsel:

A. I object to that.

By Investigator OSTERKORN:

Q. Objection overruled.
Counsel to respondent: Don't answer.

Investigator OSTERKORN to respondent:

Q. Does the "Prosveta" have another organization besides the Slovenian National Benefit Society that handles their advertising?

62 By COUNSEL:

A. That is objected to as not being relevant to the question, or issue.

Investigator OSTERKORN to respondent:

Q. Have you ever heard of a "Prosveta Advertising Agency"?

By COUNSEL:
A. That is objected to as not being relevant to the issue.
By Investigator: Objection overruled.

Investigator OSTERKORN to respondent:

Q. I again direct you to answer that question.

By COUNSEL:

A. He does not answer.

Investigator OSTERKORN to respondent:

Q. Will you answer instead of counsel?
A. I refuse to answer on advice of counsel.

By COUNSEL:

A. And for the further reason that the question is irrelevant to the issue.

Investigator OSTERKORN to respondent:

Q. Do you have any money in the bank, Mr. Witkovich?
A. We have a lot of debts and a little account here and there to pay the current debts.

Q. What is the total amount of savings you have in the bank? Approximately?

A. I couldn't tell you. I pay no attention to it. My wife handles the finances.

Q. Do you own any stock?

A. No, sir.

Q. Do you own your own home?

A. Yes, but it is mortgaged.

Q. How much is the mortgage?

A. It is over $9,000.

63 Q. Do you have any other income besides your income from the "Prosveta"?

A. No.

Q. Who is dependent upon you for your support?

A. My wife and five children; although one works but he doesn't contribute anything to the support of the family. One is in the army and we have to send him money occasionally, and the other three are in school.

Q. Since March 4, 1954, the date that the order of supervision was entered in your case, have you left the State of Illinois?

A. No, sir.

Q. Have you left the City of Chicago?

A. No, sir.

Q. Since June 25, 1953, the date that an order of deportation was entered in your case, have you been arrested for any violation of law?

A. No, sir.

Q. When you are not working, Mr. Witkovich, how do you pass your spare time?

A. I have a lot of work at home. Repair this and repair that. Always more work than time.

Q. Do you read?

A. Oh, yes.

Q. What do you read?

By COUNSEL:

A. That is objected to.

Investigator OSTERKORN to respondent:

Q. In your spare time do you read the Chicago Tribune?

By COUNSEL:

A. I object to any queries as to what the man reads for the reason that whatever he reads is protected by the First Amendment to the Constitution of the United States, and neither this inquiry nor any other department or individual has a right to inquire into what an individual resident in the United States reads. And that is applicable to whether it is the Chicago Tribune, any other newspaper or any book, publication, pamphlet or any other document that is circulated.

By Investigator: Objection overruled.

64 Investigator OSTERKORN to respondent:

Q. Do you wish to answer that question, Mr. Witkovich? Do you read the Chicago Tribune? Will you answer for yourself or do you remain mute?

By COUNSEL:

A. Mr. Witkovich will make this answer, that he is guided by his attorney in his behalf and when his attorney makes an objection Mr. Witkovich will not answer.

Investigator OSTERKORN to respondent:

Q. Do you subscribe to the Daily Worker?

By COUNSEL:

A. That is objected to for the same reason, and Mr. Witkovich will not answer.

By Investigator: Objection overruled.

Investigator OSTERKORN to respondent:

Q. Again I direct you, Mr. Witkovich, to answer the question "Do you subscribed to the Daily Worker."

By COUNSEL:

A. Mr. Witkovich has already answered through his counsel.

Investigator: I should like to have the respondent make the answer.

Counsel: I will make the answer, Mr. Osterkorn. I have already made my objection and Mr. Witkovich abides by my objection.

Investigator OSTERKORN to respondent:

Q. Mr. Witkovich, can yo . read in any other language other than Slovene and English?

By COUNSEL:

A. That is objected to for the same reason as given in objecting to whether or not he reads the Chicago Daily Tribune.

Investigator: Objection overruled.

Investigator OSTERKORN to respondent:

Q. Can you read Croatian?

65 COUNSEL:

A. That is objected to for the same reason.

Investigator: Objection overruled.

Investigator OSTERKORN to respondent:

Q. In your spare time, with whom do you associate?

A. I just explained previous to this. At home. No association outside of my cultural club—is singing on Tuesday night two hours.

Q. What is the name of that singing club?

A. Preseren.

Q. Is that a Slovene name?

A. Yes.

Q. What does that mean?

A. That is the name of a famous poet. He is the Walter Whitman in our language.

Q. Where does that club hold its singing festivals?

A. In different halls, twice a year.

Q. Do you have any other activities besides, i.e., at home and in the singing club?

A. No.

Q. Since the order of deportation was entered on March 4, 1954, have you at any time visited the office of the

"Narodny Glasnik", 1413 West 18th Street, Chicago, Illinois?

Counsel: What is that office?

Investigator: That is the "Narodny Glasnik," at 1413 West 18th Street.

COUNSEL:

A. The question is objected to on the ground that he has already testified that his activities consist wholly of his work at home with his family and of his rehearsing once a week with a singing society, and for the further reason that the Department has no right to inquire into where the individual respondent goes or whom he visits, in spite of the Section which the officer has read to the respondent.

Investigator: Objection overruled. I again direct Mr. Witkovich to answer the question.

66 COUNSEL:

A. The question has been answered through the objection of his counsel.

Investigator: I will appreciate the respondent answering it yes or no.

Counsel: Regardless of what Mr. Osterkorn would appreciate, and we would like very much to accommodate him, but as a matter of law we have to adhere to what we regard as the law.

Investigator OSTERKORN to respondent:

Q. Since the order of supervision was entered on March 4, 1954, Mr. Witkovich, have you ever visited the offices of the Bohemian publication "Nova Dova" or the Slovakian publication "Ludovy Noviny", 1510 West 18th Street, Chicago, Illinois.

COUNSEL:

A. The question is objected to on the same grounds as stated to the question relating to "Narodni Glasnik".

Investigator: Objection overruled.

Investigator OSTERKORN to respondent:

Q. I will direct Mr. Witkovich again to answer that question. Did you ever visit the offices at 1510 West 18th Street, the offices of the "Nova Dova"?

COUNSEL:

A. The question has been answered through the objection of his counsel.

Investigator OSTERKORN to respondent:

Q. I would like very much, Mr. Witkovich, if you would answer the question. Do you refuse to answer the question?

COUNSEL:

A. Sorry to insist but the purpose of Mr. Witkovich's having counsel here is for counsel to make answer under appropriate circumstances and therefore there is nothing more for Mr. Witkovich to say in response to this particular question.

Investigator OSTERKORN to respondent:

Q. Do you know the editor of the "Narodni Glasnik"?

67 COUNSEL:

A. Objected to as immaterial and not relevant to any issue.

Investigator: Objection overruled.

Investigator to respondent:

Q. Do you know Leo Fisher?
Counsel: Objected to.
Investigator: Objection overruled.

Investigator to respondent:

Q. Do you know Anton Minerich?
Counsel: Objected to for the same reason as stated before.
Investigator: Objection overruled.

Investigator to respondent:

Q. Do you know Nick Rajkovich?
Counsel: Objected to.
Investigator: Objection overruled.

Investigator to respondent:

Q. Do you know Arsenio Bartl?
Counsel: Objected to.
Investigator: Objection overruled.

Investigator to respondent:

Q. Do you know John Zuskar?
Counsel: Objected to.
Investigator: Objection overruled.

Investigator to respondent:

Q. Do you know Calvin Brook?

68 COUNSEL:

A. Objected to and in order to save the time of the recorder I will say that if further questions are asked as to whom Mr. Witkovich knows, my objection just made will stand in relation to every other such question.
Investigator: Objection overruled.

Investigator to respondent:

Q. Mr. Witkovich, do you refuse to answer the question about any of these individuals I have mentioned in asking you directly? Are you refusing to answer the question?

COUNSEL:

A. Mr. Witkovich has just answered through his attorney.

Investigator to respondent:

Q. Since the order of deportation was entered in your case on June 25, 1953, have you attended any meeting of the Communist Party of the U.S.A.?

COUNSEL:

A. Objected to as entering a phase of inquiry as to the rights of an individual which are guaranteed by the First Amendment to the Constitution of the United States, giving to every individual the right of lawful assembly without interference by any department.
Investigator: Objection overruled.

Investigator to respondent:

Q. Mr. Witkovich, why are you refusing to answer my questions that relate to organizations and publications?

COUNSEL:

A. Mr. Witkovich has indicated through his counsel the reasons for the objections made by his counsel and it is the opinion of his counsel that that is sufficient for the record; that the officer in charge has no right to inquire into the mental workings of the respondent just as long as the respondent is in complete compliance with the laws of the land, as he is and has been—certainly since the order of deportation was entered.

Investigator to respondent:

Q. Since the order of supervision was entered on March 4, 1954, have you attended any meeting of any organization other than the singing club?

69 Counsel: Objected to for the same reason as stated before.

Investigator: Objection overruled.

Investigator to respondent:

Q. Have you enlisted in your case, the deportation case, the aid of any organizations?

COUNSEL:

A. That is objected to as immaterial, irrelevant and as not being a proper source of inquiry for this department to make.

Investigator: Objection overruled.

Investigator to respondent:

Q. Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case, since the order of deportation was entered June 25, 1953?

COUNSEL:

A. That is objected to as immaterial and irrelevant and improper for the reason that the matter of free speech and

lawful assembly is protected by the First Amendment to the Constitution.

Investigator: Objection overruled.

Investigator to respondent:

Q. Have you distributed petitions or leaflets published by the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case since the order of deportation was entered June 25, 1953?

COUNSEL:

A. Objected to for the same reason and for the reason that lawful assembly, free speech, free publication and the right to distribute pamphlets if a person desires to do so is guaranteed by the Constitution.

Investigator: Objection overruled.

Investigator to respondent:

Q. I direct you, Mr. Witkovich, to answer that last question about the distribution of pamphlets. Do you refuse to answer?

69A COUNSEL:

A. Mr. Witkovich has answered through the objection of his counsel.

Investigator to respondent:

Q. Since the order of supervision have you attended any meetings or lectures at the Peoples Auditorium, 2457 West Chicago Avenue, Chicago, Illinois?

COUNSEL:

A. That is objected to for the same reasons as stated in the objections heretofore made.

Investigator: Objection overruled.

Investigator to respondent:

Q. Since the order of supervision was entered against you have you attended any meetings or socials at the Chopin Cultural Center, 1547 North Leavitt Street, Chicago?

Counsel: Objected to for the same reason.
Investigator: Objection overruled.

Investigator to respondent:

Q. Have you attended any movies since your order of supervision was entered, at the Cinema Annex, 3210 West Madison Street, Chicago?

COUNSEL:

A. As to whether the respondent goes to movies, the question would be answered by the same objections, that you have no right to inquire into his lawful activities, but the question was directed to a specific place where movies are shown, and the same objection is applicable and is therefore made to that question.
Investigator: Objection overruled.

Investigator to respondent:

Q. Are you acquainted with an individual named Irving Franklin?
Counsel: Objected to.
Investigator: Objection overruled.

70 Investigator to respondent:

Q. Are you now a member of the Communist Party of U.S.A.?
Counsel: Objected to as immaterial and not relevant to the issue, and it could be objected to on further grounds of which we are not availing ourselves but the question is objected to and the respondent will make no answer.
Investigator: Objection overruled.

Investigator to respondent:

Q. I again direct you, Mr. Witkovich, to answer the question, are you now a member of the Communist Party of the U.S.A.?
Counsel: Mr. Witkovich has answered through the objection made by his attorney.

Investigator to respondent:

Q. Do you belong to any organizations besides the Slovene National Benefit Society?

A. I belong to a fraternal organization in Pittsburgh. Slovene Eagle Society.

Q. What sort of an organization is that?

A. Fraternal, insurance and sick benefit—$1.00 a day, $250.00 death burial.

Q. Does it publish a publication?

A. No.

Q. Do you belong to any unions?

A. Yes.

Q. Would you like to name the union you belong to?

A. Newspaper Guild.

Q. Is that a Chicago local?

A. Yes.

Q. What number?

A. I don't know.

Q. Where are the headquarters?

A. I don't know.

Q. Do you hold office in that union?

A. No.

Q. Are you now or have you ever been a member of the Slovene American National Council?

71 Counsel: That is objected to for the same reasons as stated before.

Investigator: Objection overruled.

Investigator to respondent:

Q. Are you now or have you ever been a member of the United Committee of South Slavic Americans?

Counsel: Same objection.

Investigator: Objection overruled.

Investigator to respondent:

Q. Have you ever been a member of the American Slav Congress?

Counsel: Same objection.

Investigator to respondent:

Q. Why have you refused to answer so many numerous questions of mine this morning, Mr. Witkovich? On what grounds?

COUNSEL:

A. If Mr. Osterkorn requires any other grounds it seems quite superfluous and an absurb kind of question. You have no right to inquire as to why a respondent does or does not do anything unless he is violating the law and even then you have no right to inquire how his mind works. Numerous objections have been made to the questions put to the respondent for very obvious and constitutional reasons. If they do not satisfy the inquirer, it is very unfortunate but the respondent is following the advice of his counsel. He was informed that he might be here with counsel, and any further questions as to his reasons for not answering are superfluous and are objected to.

Investigator to respondent:

Q. On February 24, 1954 you were mailed at 2153 South Lawndale Avenue, Chicago, Mr. George Witkovich, a communication notifying you that an order had been entered on June 25, 1953 directing your deportation from the United States, and you were informed in that letter that under Section 242(e) of the Immigration and Nationality Act of 1952 any alien against whom an order of deportation was entered, if he wilfully fails or refuses to depart from the United States within a period of six months from the date of the order shall, upon conviction, be guilty of a felony and shall be imprisoned not more than 10 years. Did you receive such a letter a copy of which I now show you and your counsel?

72 A. I don't recall.

Investigator to counsel:

Q. Does Counsel know whether he received it?

A. Please amend your question if you desire. The fact is that this document, a copy of which you have just shown the respondent and myself, was served on the respondent in the office of the Immigration and Naturalization Service in the New Post Office Building on Canal and Van Buren Streets on March 4, 1954.

Investigator to respondent:

Q. Have you made application anywhere for travel documents necessary for your departure from the United States?

A. That affair is my counsel's. Counsel has already attended to that.

By COUNSEL:

On August 5, 1953 I wrote the Consulate General of Poland, 1301 North Ritchie Court, Chicago, Illinois, as follows:

> "I represent George Witkovich, a printer born about 56 years ago. He has resided in the United States for many years. Recently he was ordered deported on account of the fact, it was alleged, he had been a member of the Communist Party. He would like to ask permission of Poland to admit him to that country for permanent residence. Will you be good enough to send me the necessary documents for application."

On September 3, 1953 I received a letter from the Consulate General of the Republic of Poland at Chicago, Illinois, signed "Jon Sztuk, Vice-Consul" which says:

> "In response to your letter of August 5, 1953 regarding your client George Witkovich, this Consulate General is herewith sending you application for visa in triplicate. When these are properly filled out, kindly return to this office together with three photographs of the applicant."

On October 9, 1953 I again wrote the Polish Consulate, 1301 North Ritchie Court, Chicago, Illinois as follows:

> "Re: George Witkovich. I enclose application in duplicate of George Witkovich for a passport to Poland for permanent residence, together with three pictures. Will you be good enough to refer the matter to the appropriate agency and advise when action has been decided upon."

73 On October 13, 1953 I received a letter from the Consulate General of the Republic of Poland, at Chicago, Illinois, signed Wojciech Albrycht, Consul of Poland, which reads as follows:

> "This is to acknowledge receipt of yours of October 9, 1953, together with enclosures. Please be advised

that according to new regulations four questionnaires must be filled out by each applicant, and our home authorities also now require four photographs. Therefore we are herewith enclosing two more questionnaires to be filled out by your client, and when you return them also please send an additional photo of George Witkovich."

On November 3, 1953 I addressed the following letter to Wojciech Albrycht, Consul of Poland, 1301 North Ritchie Court, Chicago:

"Dear Sir:

Re: George Witkovich. Pursuant to direction in your letter of October 13, 1953, I enclose two additional copies of application for visa and two additional photographs of the above client. Thanking you for your consideration, I am".

That constitutes the total of the application and the correspondence with the government of Poland relative to accepting the respondent for permanent residence there. Since the last letter of mine dated October 9, 1953 the Chicago office of the Polish Consulate has been closed. I do not know whether this is the reason for their failure to reply to my last letter but nothing further has been received from them. It is impossible to obtain permission for the respondent to be accepted by any other country, to my knowledge at the present time, and I have made general inquiries, for the reason that the countries will not accept persons who are not citizens of those countries.

Investigator to counsel:

Q. Does that include Yugoslavia?

A. Yugoslavia also will not accept persons who are not at the present time citizens of Yugoslavia.

Investigator to respondent:

Q. Is there any other country you wish to be deported to, Mr. Witkovich, in the event you are deported?

By Counsel:

A. That has already been covered by the immigration hearing and is not part of the present inquiry.

74 Investigator to respondent:

Q. Have you any further statements you wish to make, Mr. Witkovich?
A. No.

Investigator to counsel:

Q. Does Counsel wish to make any further statements?
A. No.

Investigator to respondent:

Q. When the secretary has transcribed the notes, will you be willing to sign the statement?

By Counsel:

A. There is no need to sign any statement. The respondent was under oath.
Attest:

Louis J. Osterkorn,
Investigator

74a Stenographer's Certificate to foregoing transcript omitted in printing.

75 [File Endorsement Omitted]

76 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Order Re: Stipulation as to Record—July 18, 1956

On stipulation of the parties hereto,

It is ordered that the following documents shall be included as a part of the record on appeal to the Supreme Court of the United States:

1. Order of supervision served on defendant on March 4, 1954.

2. Sworn testimony given by the defendant herein on September 14, 1954.

3. Stipulation of the parties, with regard thereto.

Enter:

JOHN P. BARNES,
United States District Judge

Dated at Chicago, Illinois,
this 18th day of July, 1956.

77 IN UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

Vio: Section 1252(d), Title 8, United States Code.

(Alien pending deportation, failed to answer questions of an Officer of the Immigation & Naturalization Service.)

78 11-3-55 Filed Indictment JS2

11-3-55 Order issue bench warrant & fix bond at $4000.00 & that indictment be suppressed for service—Barnes, J.

11-4-55 On mo of U.S. order releasing suppressed indictment—Sullivan, J.,

11-4-55 Filed appearance of atty

11-4-55 Filed appearance bond $4,000.00 s

11-10-55 On mo deft plea & arr cont to Feb. 17, 1956 10 A.M. Deft given 30 days to file preliminary motions & Govt gv 20 days after to answer—Sullivan, J.

11—-55 Mailed notices s

12—-55 Filed warrant ret'd exctd

12-12-55 Filed mo to dismiss indictment (Witkovich) (6) s

12-29-55 On mo deft order extend time to Jan. 6, 1956 for filing brief in support of motion to dismiss indictment—Sullivan, J.

12-30-55 Mailed notices s

1-6-56 Filed brief in support of mo to dismiss indictment (JK)

1-26-56 Filed notice

1-26-56 Filed memorandum in opp to deft's mo to dismiss (JK)
2-15-56 Filed Memorandum (8)
2-15-56 Mo of deft to dism indivt overruled. (Memorandum)

Counsel for deft enters plea of not guilty for deft & cause set for trial Mar 26, 1956 10 A.M.—Sullivan, J.

2-16-56 Mailed notices s
2-28-56 Filed mo for clarification of Court's ruling denying deft's mo to dismiss with affidavit of mailing & notice
2-28-56 Arguments heard & concluded. Both sides ordered file briefs simultaneously within 10 days & 5 days thereafter to file reply briefs & mo U.S. for clarification Court's ruling taken under advst—Sullivan, J.
2-28-56 Mailed notices s
3-8-56 Filed notice
3-8-56 Filed add'l & suppl mo to dismiss (5)
3-8-56 Filed brief in suppr of add'l & suppl mo to dismiss (10)
3-9-56 Filed affidavit of mailing
3-9-56 Filed suppl brief in opp to mo to dismiss (JK)
3-15-56 Filed notice
3-15-56 Filed reply brief of Geo. I. Witkovich to Gov's suppl brief in opp to motion to dism indict (5)
3-22-56 Cs reset for trial from Mar 26 to May 31, 1956 10 A.M.—Sullivan, J.
3-22-56 Mo for bill particulars ent'd & taken under advst —Sullivan, J.
3-22-56 Filed notice
3-22-56 Filed mo for bill particulars
3-22-56 Mailed notices s
5-10-56 Filed Memorandum entered by Judge Sullivan (15)
5-10-56 Mo deft to dismiss indict sustained—Sullivan, J. JS3
5-10-56 Mailed notices s
6-8-56 Filed Notice of appeal to the Supreme Court of the United States by U.S.A. and Proof of service (3 & 1) B 5.00 US

79 Clerk's Certificate to foregoing transcript omitted in printing.

80 SUPREME COURT OF THE UNITED STATES

No. 295 —, October Term, 1956

[Title omitted]

APPEAL from the United States District Court for the Northern District of Illinois.

ORDER NOTING PROBABLE JURISDICTION—October 8, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

U. S. GOVERNMENT PRINTING OFFICE: 1956 406915 479

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Statute:

Immigration and Nationality Act of 1952, Section 242(d), 66 Stat. 163, 208, 211 as amended September 3, 1954, 68 Stat. 1232, 8 U.S.C. (1952 ed. Supp. II) 1252(d)	2-3, 4, 6
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the District Court on the original motion to dismiss and the supplemental motion to dismiss are not yet reported. Copies thereof are set forth in Appendix A, *infra*, pp. 12-24.

JURISDICTION

On May 10, 1956, the District Court entered an order dismissing the indictment on the ground that it did not allege an offense under Section 242(d) of the Immigration and Nationality Act of 1952, as the court construed that statute. The notice of appeal to this Court was

filed in the District Court on June 8, 1956. Jurisdiction of this Court to review on direct appeal the decision of the District Court dismissing the indictment, based on a construction of the statute on which the indictment was founded, is conferred by 18 U.S.C. 3731.

QUESTION PRESENTED

Under Section 242(d) of the Immigration and Nationality Act of 1952, an alien against whom a final order of deportation has been issued but whose deportation has not been effectuated within six months of such final order is, pending eventual deportation, subject to supervision under regulations prescribed by the Attorney General which must include, *inter alia,* a condition requiring the alien "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper."

The question presented is whether an alien ordered deported for past membership in the Communist Party, who is subject to such an order of supervision, may be questioned concerning present membership in and activities on behalf of the Communist Party and other organizations and associations with particular individuals, so that willful failure to answer such questions constitutes a crime under Section 242(d), or whether the inquiry authorized by the statute must relate solely to the alien's availability for deportation.

STATUTE INVOLVED

Section 242(d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended Septem-

ber 3, 1954, 68 Stat. 1232,[1] 8 U.S.C. (1952 ed. Supp. II) 1252(d), provides:

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information, under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

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[1] This amendment deleted the words "shall upon conviction be guilty of a felony, and" from the list of sanctions set forth in the final sentence.

STATEMENT

Appellee is an alien who was ordered deported because of membership in the Communist Party. When the order of deportation was not effectuated within six months after it had become final, he became subject to the supervision requirements of Section 242(d), *supra*. On March 4, 1954, he was served with an order of supervision, a copy of which is set forth in Appendix B, *infra*, pp. 25-29. The order of supervision required, *inter alia:*

> That said alien shall terminate and remain disassociated from membership in, if any, support or other activity if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization.
>
> That said alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph above.

In October 1955, an indictment was returned against appellee in the United States District Court for the Northern District of Illinois charging a violation of Section 242(d) of the Immigration and Nationality Act of 1952, in that on September 14, 1954, appellee had willfully failed to answer questions and give information as required by the statute and the order of supervision. The questions which appellee refused to answer

are set forth in the indictment, and include questions as to appellee's membership in the Communist Party and other organizations, attendance at meetings of the Communist Party and other organizations, and his acquaintance with a number of individuals.[2]

Appellee moved to dismiss the indictment on the ground, among others, that the statute on which the indictment was founded was unconstitutional. In an opinion, dated February 15, 1956, the District Court upheld the constitutionality of the statute but stated that he interpreted it to confer on the Attorney General "power to supervise the alien to make sure he is available for deportation, and no further power" (Appendix A, *infra*, pp. 16-17). The court held that clause (3) of the statute, requiring as one of the conditions of supervision, that the alien be required to give information "as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper", must be read "to mean such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes" (Appendix A, *infra*, p. 16).

After a motion by the government for clarification of the opinion, and a supplemental motion by appellee to dismiss the indictment on the ground that it appeared from the face thereof that none of the questions were relevant to availability for deportation, the District

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[2] The transcript of the hearing held on September 14, 1954, indicates that appellee refused to answer on First Amendment grounds and did not claim the privilege against self-incrimination under the Fifth Amendment.

By stipulation, the order of supervision and the transcript of the examination of appellee on September 14, 1954, are included in the record on this appeal.

Court dismissed the indictment. In its memorandum opinion, it reaffirmed its previous construction of Section 242(d) as conferring on the Attorney General powers of supervision only to make certain that the alien will be available for deportation. By that test, it found that none of the questions set forth in the indictment was relevant, Appendix A, *infra* pp. 18-24.

THE QUESTION IS SUBSTANTIAL

Section 242(d) of the Immigration and Nationality Act of 1952 provides for supervision of aliens who have been ordered deported but whose deportation has not been effectuated within six months after the order of deportation has become final. It sets forth certain conditions which must be included in the orders of supervision, including one that the alien be required "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper", and another condition that he be required "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case". Pursuant to this authority, the Attorney General, through the Immigration and Naturalization Service, has imposed restrictions on conduct or activities to fit the particular type of case involved, *e.g.*, special restrictions for those ordered deported because of criminal activties, other conditions for those to be deported because of membership in the Communist Party. As to the latter group, among which appellee's case falls, it is usually made a condition of supervision that the alien refrain from participation in and active support of the Communist Party and from association with

persons known or believed by him to be Communists. The questions which appellee is charged with having willfully failed to answer relate to that type of activity.

The holding of the District Court that this willful failure to answer is not a crime because the Attorney General may inquire only as to matters which directly concern availability for deportation would substantially curtail the authority of the Attorney General to impose restrictions on the conduct of supervised aliens, not only in this type of case, but in all others. The ruling is, we believe, contrary to the language of the statute which is sweeping in its grant of authority, inconsistent with the intent of Congress as revealed by the legislative history, and in conflict with the decision of this Court in *Carlson* v. *Landon*, 342 U. S. 524.

1. The language of the 1952 Act is very broad. Had Congress intended to confer on the Attorney General only the power to prescribe and inquire about conditions which directly relate to availability for deportation, it would hardly have been necessary to use the all inclusive language of clause (3) requiring the alien "to give information under oath as to his nationality, circumstances, habits, associations, and *such other information, whether or not related to the foregoing,* as the Attorney General may deem fit and proper" (emphasis added). Rather, this sweeping language suggests that the Congress intended the Attorney General to do what was done here, *i.e.*, tailor the conditions of supervision to the circumstances of each case so that the alien, who has already been determined to be of the class which Congress regards as undesirable, should not, merely because his deportation cannot be effectuated, be in a position to continue the activities which gave rise to his deportation.

2. The legislative history confirms this view. Section 242(d) had its origin in the Hobbs Bill, H.R. 10, 81st Cong., which was designed to deal with the problem posed by the many aliens who had been ordered deported but remained in the United States indefinitely because the countries of their nationality refused to receive them (see H. Rep. 1192, 81st Cong., 1st Sess. pp. 7-10; S. Rep. 2239, 81st Cong., 2d Sess. pp. 4, 6-8). As originally introduced, Section 4 of the bill provided that, if deportation had not been effected within six months of the final order, the alien would be subject to further supervision or *detention*. The hearings on the bill (Hearings before Subcommittee 1, House Judiciary Committee on H.R. 10, 81st Cong., 1st Sess.), as well as the reports, make clear that the sponsors of the legislation were particularly concerned with the fact that known criminals and Communists who could not be deported were continuing their activities without restraint.

A letter from the Attorney General (Hearings, pp. 4-6) presented forty case histories, some of which are discussed in H.Rep. 1192, 81st Cong., 2d Sess. pp. 8-9. Among those was Frank E. Spector who was described in the Attorney General's letter as "a distinct threat to the national security of the United States" with the comment that we "have no means whereby he can be taken into custody" (H. Rep. 1192, p. 8). The Attorney General also referred to the need for power to excise continuous supervision and control over aliens who "sometimes engage in subversive activities" (Hearings, p. 5). There were likewise references to sex criminals "allowed to continue at large in the United States as a potential menace" (H. Rep. 1192, p. 8). The report states (p. 10):

> The committee feels that aliens illegally here are not necessarily entitled to enjoy precisely the same privileges as those who are lawfully resident, merely because of the inability of this Government to carry out its policy to rid the country of their presence in conformity with law. If deportation proves impossible, it seems reasonable that subversive, criminal, immoral, and other undesirable persons should be subject to supervision and control by the Government in order that their activities and conduct may be known.

The provision for detention was subsequently dropped because of expressed doubts as to its constitutionality (see S. Rep. 2239, 81st Cong., 2d Sess. p. 8). Eventually, only a requirement of supervision, essentially the same as that of present Section 242(d) of the 1952 Act, was enacted as Section 23 of the Internal Security Act of 1950, 64 Stat. 1010. There is nothing which shows any lessening of the Congressional concern with the potential danger to national security from the activities of deportable aliens which had led to the original suggestion of the more drastic sanction of indefinite detention. The very fact that the provision was enacted as part of the Internal Security Act of 1950 indicates that Congress contemplated that the power of supervision given to the Attorney General would be used in the interests of the national security to curb the actions of those ordered deported for Communist activities.

3. In *Carlson* v. *Landon*, 342 U. S. 524, this Court held that the power (conferred by Section 23 of the Internal Security Act of 1950) to hold aliens in custody pending a determination of deportability could properly be invoked by the Attorney General, not only on

the basis of probable availability for deportation, but also by reason of the threat to the national security represented by the activities of participating members of the Communist Party. If that is a proper basis for complete detention before deportability has been determined, it must follow that disassociation from activities in support of the Communist Party is a reasonable condition of supervision for those aliens whose deportation has been ordered—who should, in accordance with the Congressional will, be out of the country, but who are here only because of the special circumstance that no country will receive them. And if it is a reasonable condition of supervision, an alien may properly be questioned with respect to his compliance therewith.[3]

4. As of March 31, 1956, there were approximately 3500 orders of supervision directed to aliens whose deportation had not been effectuated within six months after the final deportation order, all of which would to some degree be affected by the ruling of the District Court. Approximately 225 of such orders relate to persons with Communist backgrounds. The question here presented is therefore clearly of importance in the administration of the Immigration and Nationality Act of 1952.

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[3] The particular question here involved was part of the broader attack on the constitutionality of Section 242(d) which was argued before this Court in *Nukk* v. *United States* (No. 29, O.T. 1955), but was not reached for decision. 350 U.S. 869.

CONCLUSION

In sum, Congress contemplated that aliens ordered deported, but whose deportation could not be effected, would be subject to reasonable restrictions on their activities designed, not only to see that they remained available for deportation, but to prevent them from engaging in harmful activities. The District Court was therefore in error in dismissing the indictment, and its decision should be reviewed by this Court.

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JULY, 1956.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 55 CR 607

UNITED STATES OF AMERICA

vs.

GEORGE I. WITKOVICH, also known as JURI ISADOR WITKOVICH

MEMORANDUM

This is an indictment under Title 8 U.S.C. Sec. 1252 (d), which reads:

> "(d) Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) *to give information under oath as to his nationality, circumstances, habits, associations, and activities,* and

such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or *wilfully fail to* appear or to *give information* or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction, be *guilty of a felony,* and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both." (Italics added.)

A motion to dismiss the indictment, attacking the constitutionality of the statute, is now before the court. The charge is that defendant violated clause (3), underlined above, in that he wilfully failed to answer certain questions which are set forth in the indictment. There is no allegation that he refused to appear, to submit to a medical or psychiatric examination, or to submit to reasonable restrictions on his conduct; these requirements are not, therefore, directly involved, although incidental consideration of them is necessary.

The parties agree that this Act is an exercise by Congress of the power of the United States as a sovereign state to deal with aliens within its territory (*Carlson v. Landon,* 342 U.S. 524 (1952); *United States v. Tandaric,* 152 F. 2d 3, 5 (C.A. 7, 1946); cert. den. 327 U.S. 786). To be upheld, it must constitute a valid delegation of that power to the Attorney General, in terms

definite enough to form a standard of guidance for his conduct (*Winters v. New York,* 333 U.S. 507, 515 (1947); *Lichter v. United States,* 334 U.S. 742, 786 (1948)). Whether it does or not can be determined only by an examination of the section in its context: Title 8 U.S.C.A. 1251, *et. seq.*, and the cases which have interpreted those sections. Section 1251 provides that any alien in the United States shall be deported upon the order of the Attorney General for causes there set forth; section 1252(b) prescribes the procedure for the entry of such an order. Pending determination of deportability, an alien may in the discretion of the Attorney General be continued in custody, or released on bond or conditional parole (Section 1252(a)). The Attorney General's discretion under this section is not unlimited, but may be reviewed by the courts to determine whether he acted reasonably (*U.S. v. Shaughnessy,* 212 F. 2d 128 (C.A. 2, 1954); *U. S. v. Holton,* 205 F. 2d 228, 230 (C.A. 7, 1953); *Ocon v. Landon,* 218 F. 2d 320, 324 (C.A. 9, 1954). After the entry of a final deportation order, the Attorney General is given six months within which to "effect the alien's departure," during which the alien may be detained or released on bond. (Sec. 1252(c)). The alien must be released from detention sooner than six months if it appears that there is no reasonable possibility of his being deported in the foreseeable future (*U.S. v. District Director of Immigration,* 117 F. Supp. 541 (S.D. N.Y., 1953); *U. S. ex rel Cefalu v. Shaughnessy,* 117 F. Supp. 473 (S.D. N.Y., 1954)). Although this subsection provides that after the six-months period, if deportation has not been effected, the alien "shall become subject to such further supervision and detention pending

eventual deportation as is authorized in this section," it has been held that "and detention" is surplusage, the period of detention must terminate after six months, and the alien thereafter be subject only to such detention as may result from a violation of the supervision provisions of subsection (d)(3). (*U. S. ex rel Youw v. Shaughnessy*, 102 F. Supp. 799, 801, (S.D. N.Y., 1952); *U.S. ex rel Blankenstein*, 177 F. Supp. 699 (S.D. N.Y., 1953)). The last-named section is the one here considered, and has been quoted in full; the regulations are in substantially the language of the statute. Subsection (2) provides that wilfull refusal or failure to depart after an immigration order is final shall be a felony; Section 1253 relates to the countries to which the Attorney General shall deport the aliens.

It is apparent from this summary of the deportation procedure that after the entry of a final order of deportation, the sole remaining power and duty of the Attorney General is to make sure that the alien departs from the country. It follows that the powers of supervision given him are intended as an aid in enforcing this power by making certain that the alien will be available for deportation when and if the time comes that this is possible. Clauses (1), (2), and (4) of the same subsection are reasonably calculated to fulfill this purpose. Clause (1), requiring the alien to submit himself for identification, is clearly helpful to that end; the requirement of physical examinations might be necessary to deportation to a particular country; and in (4), "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case," the word "reasonable" may be read as "those restrictions which tend to guarantee his

availability for deportation." The same may be said of clause (3), of immediate concern here: "to give information * * * as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." This must be read to mean such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes.

The Government urges that the Attorney General may, under this section, question the alien to determine not only his availability for deportation, but also to satisfy himself that the activities for which the alien was ordered deported are not continuing. There is no warrant for such an interpretation, since the Attorney General is powerless to take any further action even if they are continuing. A deportation order is not a magic incantation, but a finding that the alien is, for one reason or another, an undesirable resident of this country. Further, it is an order entered in a civil proceeding, in which proof is by "clear and convincing" evidence, rather than beyond a reasonable doubt. *U. S. ex rel Vajtauer v. Com'r,* 273 U.S. 103, in which counsel need not be appointed (*U. S. v. Vander Jagt,* 133 F. Supp. 676 (W.D. Mich., 1955)), and hearsay evidence may be admitted (*Navarette-Navarette v. Landon,* 223 F. 2d 234 (C.A. 9, 1955)).

There is accordingly no justification for allowing a deportation order to accomplish more than its intended purpose. It establishes, in a hearing adequate for this end, that the alien shall depart this country and nothing more. The Attorney General has been given power to

supervise the alien to make sure he is available for deportation, and no further power. If, after the entry of the order, the alien engages in activity punishable under the Criminal Code, the Attorney General is at liberty to bring him before a Grand Jury and move for an indictment in the usual way. If he is not engaging in such activity, and if it is physically impossible to deport him, and if increasing numbers of aliens in this situation has created a serious problem, then Congress may solve it by giving some official definite and measureable power to deal with the dilemma. So far it has not done so, except to the extent that it has given the Attorney General the powers of supervision here considered.

This discussion has dealt with most of the objections urged by the defendant. He also urges that the statute creates a crime by legislative fiat, leaving the court nothing to do but to pronounce sentence in a summary proceeding (*Wong Wing v. United States*, 163 U. S. 228, 236 (1896)), and that procedural due process has been violated. That is not the case when the statute is correctly interpreted. The court will determine the relevancy of the questions by a definite standard: do they assist the Attorney General in making certain that the alien will be available for deportation?

Defendant also contends that the statute here considered violates the First Amendment guarantee of freedom of speech of which freedom of silence has been assumed to be a part (*United States v. O'Connor*, 135 F. Supp. 590 (D.C., 1951), and cases cited page 596). However, speech may be compelled by Congress, and silence punished, when special circumstances warrant restrictions on traditional freedoms. Thus Title 2

U.S.C. Sec. 192 making it an offense punishable by fine or imprisonment to fail to answer proper questions asked by Congressional committees has been upheld (*In re Chapman*, 166 U.S. 661, 672 (1896); *United States* v. *Bryan*, 339 U.S. 323, 327 (1949)). Under this statute, however, questions must be relevant to the Congressional power to legislate (*Quinn v. United States*, 349 U.S. 155, 162 (1955)); just as in the instant case they must relate to the valid power of the Attorney General.

The motion to dismiss the indictment is overruled. February 15, 1956.

After the announcement of the foregoing opinion, new motions and briefs were filed by both parties.

Defendant filed a "Supplemental Motion to Dismiss Indictment." His argument in support of this motion in part reiterates objections previously considered by the court. He contends that the indictment is vague and uncertain in that it fails to set forth the order of deportation, the authority by which, or the sections under which it was made, or that the defendant had notice of it. These objections must be overruled. The indictment is in the language of the statute and sufficiently notifies the defendant of the charge which he must meet. Several other objections urged were dealt with in the original memorandum, but have been reconsidered, and are overruled. The Court adheres to its original opinion that the statute, as construed, is not unconstitutional.

The government's brief in answer to this Supplemental Motion to Dismiss is devoted to the presentation of additional material in support of its original conten-

tion that the statute gives the Attorney General power to question a deportable alien about matters other than his availability for deportation. This additional information has been carefully considered and found not to be convincing. The theme of the government's argument appears to be that to let deportable aliens roam the country unsupervised would create a very dangerous situation. The Court is of the same opinion. As the previous memorandum indicated, Congress quite correctly gave the Attorney General power to make certain of the alien's whereabouts at all times. To this end, under the statute here considered, the Attorney General could properly ask, and enforce his right to receive answers to, questions as to the alien's place of residence, whether he owns his home or rents, where he works and how long he has worked there, whether he is married and lives with his wife, and an endless list of inquiries along the same line. This power is quite sufficient to ensure that the alien will not be without supervision. To hold that the statute intended to give an official the unlimited right to subject a man to criminal penalties for failure to answer absolutely any question the official may decide to ask would raise very serious constitutional questions. The Court accordingly reiterates that the power given to the Attorney General by the statute in question is to enforce his right to question a deportable alien to make certain that the latter is holding himself available for deportation.

The defendant's motion asks that the Court now examine the questions set forth in the indictment, and dismiss the indictment for the reason that it is apparent that none of them is related to his availability for deportation. Although there is no authority under this particular section, such a procedure is dictated by anal-

ogous situations in other fields. Thus it is the duty of the judge to rule on whether or not the privilege against self-incrimination has been properly claimed, and "To sustain the privilege, it need only be evident from the implications of the question, the setting in which it is asked, that responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result" (*Hoffman* v. *United States*, 341 U. S. 479, 489 (1950); quoted, *Emspak* v. *United States*, 349 U. S. 190, 199 (1954)). And in a prosecution for perjury, it is clear that the materiality of the questions asked is a question of law for the court (*Sinclair* v. *United States*, 279 U. S. 263, 298 (1929); *United States* v. *Orman*, 207 F. 2d 148, 155 (1953)), and that materiality "should appear from the face of the indictment" (*Markham* v. *United States*, 160 U. S. 319, 325 (1895)). Where the questions are not relevant on their face, but there is any probability that they could be shown to be relevant, it is proper to give the government an opportunity to make some sort of showing on the question (*Bowers* v. *United States*, 202 F. 2d 447, 449 (C.A., D.C., 1953); *United States* v. *Orman*, *supra*). However, where it appears from the indictment that the questions alleged are not even probably material, the indictment should be dismissed. (*United States* v. *Garvett*, 35 F. Supp. 644, 646 (E.D. Mich, 1940); *United States* v. *Seymour*, 50 F. 2d 930, 940 (D. Neb., 1931); *United States* v. *Cameron*, 282 Fed. 684, 692 (D. Ariz., 1922)). Where it is perfectly apparent to the trial judge from the face of the indictment that the questions set forth are irrelevant, the defendant will not be exposed to what would be a "mere ceremony of trial" (*United States* v. *Laut*, 17 F.R.D. 31, 36 (S.D., N.Y., 1955)).

In the present case, the government apparently agrees that a ruling on the questions now is the proper procedure in this case. In its brief in opposition to the motion to dismiss, it has not urged that the questions were relevant, but has confined itself to urging the court to reverse its previous position. Further, in a "Motion for Clarification" of the Court's previous memorandum, it has prayed "that the Court rule on the legality of the questions asked."

The law in analogous situations, reason, and the explicit request of both the government and defendant, thus dictate that I examine the questions set forth in the indictment. This examination is for the purpose of determining whether they are (a) clearly relevant, (b) possibly relevant, or (c) clearly irrelevant, to the matter of assisting the Attorney General to make certain that the alien is available for deportation.

Of the twenty-two questions on which the indictment is based, many are so far afield as to require no discussion, since it is apparent at a glance that they are in no way relevant to this purpose. These are as follows:

> "Can you read in any other language than Slovene and English?"
>
> "Have you attended any meeting of any organization other than the singing club?"
>
> "Have you addressed any lodges of the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case * * *?"
>
> "Have you distributed petitions or leaflets published by the (above) Society seeking aid for you, in your behalf * * *?"
>
> "Since the order of supervision have you attended

any meetings or lectures at the Peoples Auditorium * * *?"

"* * * Have you attended any meetings or socials at the Chopin Cultural Center * * *?"

"Have you attended any movies * * * at the Cinema Annex?"

"Are you now or have you ever been a member of the Slovene American National Council?"

"Are you now or have you ever been a member of the United Committee of the South Slavic Americans?"

There is no allegation which would shed any light on how these activities would in any way affect the probability of the alien's presenting himself to immigration officials when required to do so. The questions by themselves are completely meaningless in this context.

The same may be said of ten other questions, eight of which are "Do you know John Doe?", and two "Have you visited the office of John Doe?" "We seriously doubt whether the 'Do-you-know-a-certain-person' question, without more, can ever be said to be pertinent for the purpose of a criminal prosecution under Sec. 192" (*Bowers* v. *United States, supra,* at page 447; see also *United States* v. *Auippa,* 102 F. Supp. 609, 613 (N.D., Ohio, 1950).

The first question in the indictment is "Do you subscribe to the Daily Worker?" Quite aside from its obvious irrelevancy to availability for deportation, to subject a man to criminal penalties for failure to answer a question as to what he reads would be an apparent infringement of rights protected by the First Amendment.

The remaining two questions are "Have you attended

any meetings of the Communist Party of the U.S.A.?", and "Are you now a member of the Communist Party of the U.S.A.?" It is apparent that an affirmative answer to this question would not indicate anything about whether or not the defendant was holding himself in readiness for deportation. Directly in point are the many cases which have held that whether or not a person is a member of the Communist Party, by itself, has no relationship to his fitness to be admitted to bail. The leading case is *Stack* v. *Boyle,* 342 U. S. 1, 5 (1951), in which the Court considered a motion for reduction of bail by persons indicted under the Smith Act. The only evidence offered by the Government was a showing that four persons previously convicted under that Act had forfeited bail. The Court found such a showing insufficient, remarking that "the fixing of bail for any individual defendant must be based upon *standards relevant* to the purpose of *assuring the presence of that defendant.*" (underscoring added).

A similar holding in *Christoffel* v. *United States,* 190 F. 2d 560, 567 (C.A., D.C., 1952) is explained in the following quotation:

> "The Government urges that the fact that Christoffel is a Communist and is active in party affairs renders unlikely his appearance when required to appear. * * * Moreover, even if it be assumed that (he) is a Communist and is actively engaged in Communist party affairs, this, without more, is not a proper ground for denial of bail. * * * In the instant case the present primary issue is whether Christoffel will, under the conditions of bail * * * make appearance before the court when required to do so."

The opinion then quotes from another bail case which reached the same result on the same reasoning, *Williamson* v. *United States*, 184 F. 2d 280, 284 (C.A. 2, 1950):

> "But the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day."

Another authority to the same effect is *United States* ex rel *Pirinsky* v. *Shaughnessy*, 184 F. 2d 280, 284 (C.A. 2, 1950).

Accordingly, while the defendant's contention that the Act is unconstitutional is overruled, the indictment will be dismissed for the reason that none of the questions there set forth is relevant to defendant's availability to deportation.

(Sgd.) PHILIP L. SULLIVAN,
Judge.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Chicago, Illinois

District File No. E-10-685
A. R. No. A-5-509-411

Date March 4, 1954

ORDER OF SUPERVISION

In the case of GEORGE WITKOVICH, whose deportation in accordance with law was ordered on June 25, 1953.

Section 242(d) of the Immigration and Nationality Act provides:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) tc submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the

Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than 1 year, or both."

Therefore, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration

district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) the 7th day of each month at —, (a.m.) (p.m.) to the Officer in Charge of the Immigration and Naturalization Service at Room 905 New Post Office Bldg., Chicago, Illinois.

The written report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment, (f)

(5) That said alien shall report to.....
in person .....

(6) That said alien shall terminate and remain disassociated from membership in, if any, support or other activity if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization.

(7) That said alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph above, provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or

activities of any of the organizations or activities mentioned in preceding subparagraph.

(8) That said alien shall not violate Section 2385 of the "Smith" Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50, U. S. Code).

(9) That said alien shall not travel outside the State of Illinois nor 50 miles outside the City Limits of Chicago, Illinois.

CHICAGO, ILLINOIS

JOHN P. SWANSON,
Chief Border Patrol &
Deportation Branch,
Chicago District.

I, George Witkovich, hereby acknowledge that I have read and understand the terms of this order, a copy of which I have received. I further understand that failure to comply with the terms of this order or with any of the conditions of 242(d) of the Immigration and Nationality Act, will subject me to prosecution.

Z. J. REAM
Parole Officer
Rm 905 New Post Office Bldg., Chgo., Ill.

——— ———,
2153 South Lawndale, Chicago, Illinois.

I, ..., hereby acknowledge that I understand the terms set forth above and hereby agree to furnish a written report ..... each month to the Officer in Charge concerning the alien's

name, registration number, current address, place of employment, associates, and organizational activities, and that I will immediately report any failure on the part of the alien to comply with the terms of the order or information coming to my attention which might indicate that the alien intends to abscond or otherwise violate this order.

Note: The subject refused to sign acknowledgment of this order therefore, it was read to him in the presence of the undersigned, this 4th day of March, 1954.

(S.) D. J. SHIPMA,
Investigator.
(S.) R. A. DENNER,
Patrol Insp.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 302104 89

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 295

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court on the original motion to dismiss (R. 7–11) and on the supplemental motion to dismiss (R. 16–25) are reported at 140 F. Supp. 815.

JURISDICTION

On May 10, 1956, the District Court entered an order dismissing the indictment on the ground that it did not allege an offense under Section 242 (d) of the Immigration and Nationality Act of 1952, as the court construed that statute (R. 26). The notice of appeal to this Court was filed in the District Court on

June 8, 1956 (R. 26–27). This Court noted probable jurisdiction on October 8, 1956 (R. 54). Jurisdiction of this Court to review on direct appeal the decision of the District Court dismissing the indictment, based on a construction of the statute on which the indictment was founded, is conferred by 18 U. S. C. 3731.

QUESTION PRESENTED

Whether an alien ordered deported for membership in the Communist Party, who is subject to supervision under Section 242 (d) of the Immigration and Nationality Act of 1952 pending deportation, may be questioned concerning present membership in and activities on behalf of the Communist Party and other organizations and concerning associations with particular individuals, or whether the inquiry authorized by the statute must relate solely to the alien's availability for deportation.

STATUTES AND REGULATION INVOLVED

Section 242 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended September 3, 1954, 68 Stat. 1232,[1] 8 U. S. C. (1952 ed. Supp. II) 1252 (d), provides:

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which

[1] This amendment deleted the words "shall upon conviction be guilty of a felony, and" from the list of sanctions set forth in the final sentence.

will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Section 2 of the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781, provides:

* * * [T]he Congress hereby finds that—

(1) There exists a world Communist movement * * * whose purpose it is * * * to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

* * * * *

(7) In carrying on the activities referred to in paragraph (6), such Communist organ-

izations in various countries * * * operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. * * *

* * * * *

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

* * * * *

(15) * * * The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress * * * enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Section 242.3 (c) of the Immigration and Naturalization Regulations, 17 F. R. 11512, as amended June 19, 1953 (18 F. R. 3530) and July 20, 1954 (19 F. R. 4442), 8 C. F. R. 242.3 (c), provides:

(c) *Release; supervision after six months' period has expired: warning of penal provisions.* An alien against whom an order of de-

portation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242 (d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed.

STATEMENT

Appellee is an alien who was ordered deported because of membership in the Communist Party (R. 27). When the order of deportation was not effected within six months after it had become final, he became subject to the supervision requirements of Section 242 (d) of the Immigration and Nationality Act of 1952, *supra*, pp. 2–3 (R. 1). On March 4, 1954, he was

served with an order of supervision requiring *inter alia* (R. 28–31):

> That said alien shall terminate and remain disassociated from membership in, if any, support or other activity if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization.
>
> That said alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph above [except member of family or legal counsel].

In October 1955, an indictment was returned against appellee in the United States District Court for the Northern District of Illinois charging a violation of Section 242 (d) of the Immigration and Nationality Act of 1952, in that on September 14, 1954, appellee willfully failed to answer questions and give information as required by the statute, the regulations, and the order of supervision (R. 1–3). The questions which appellee refused to answer included questions as to his membership in the Communist Party and other organizations, attendance at meetings of the Communist Party and other organiza-

tions, and his acquaintance with a number of individuals.[2] Appellee refused to answer the first question

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[2] The questions, set forth in full in the indictment, are as follows (R. 2–3):

(a) Q. Do you subscribe to the Daily Worker?

(b) Q. Mr. Witkovich, can you read in any other language other than Slovene and English?

(c) Q. Since the order of supervision was entered on March 4, 1954, have you at any time visited the office of the "Nardoni Glasnik", 1413 West 18th Street, Chicago, Illinois?

(d) Q. Since the order of supervision was entered on March 4, 1954, Mr. Witkovich, have you ever visited the offices of the Bohemian publication "Nova Dova" or the Slovakian publication "Ludovy Noviny", 1510 West 18th Street, Chicago, Illinois?

(e) Q. Do you know the editor of the "Narodni Glasnik"?

(f) Q. Do you know Leo Fisher?

(g) Q. Do you know Anton Minerich?

(h) Q. Do you know Nick Rajkovich?

(i) Q. Do you know Arsenio Bartl?

(j) Q. Do you know John Zuskar?

(k) Q. Do you know Calvin Brook?

(l) Q. Since the order of deportation was entered in your case on June 25, 1953 have you attended any meeting of the Communist Party of the U. S. A.?

(m) Q. Since the order of supervision was entered on March 4, 1954, have you attended any meeting of any organization other than the singing club?

(n) Q. Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case, since the order of deportation was entered June 25, 1953?

(o) Q. Have you distributed petitions or leaflets published by the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case since the order of deportation was entered June 25, 1953?

(p) Q. Since the order of supervison have you attended any meetings or lectures at the Peoples Auditorium, 2457 West Chicago Avenue, Chicago, Illinois?

(q) Q. Since the order of supervision was entered against you have you attended any meetings or socials at the Chopin Cultural Center, 1547 North Leavitt Street, Chicago?

(Footnote is continued on next page.)

on the ground that it violated the First Amendment and the remaining questions on grounds of irrelevance. He did not claim the privilege against self-incrimination under the Fifth Amendment (R. 36–37, 39–48).

Appellee moved to dismiss the indictment on the ground, among others, that the statute on which the indictment was founded was unconstitutional (R. 3–7). In an opinion, dated February 15, 1956, the district court upheld the constitutionality of the statute but stated that it interpreted it to confer on the Attorney General "power to supervise the alien to make sure he is available for deportation, and no further power" (R. 10), and that clause (3) of the statute, requiring as one of the conditions of supervision that the alien be required to give information "as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper", must be read "to mean such information as is necessary to enable the Attorney General to be certain that the alien is holding

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(r) Q. Have you attended any movies since your order of supervision was entered at the Cinema Annex, 3210 West Madison Street, Chicago?

(s) Q. Are you acquainted with an individual named Irving Franklin?

(t) Q. Are you now a member of the Communist Party of U. S. A.?

(u) Q. Are you now or have you ever been a member of the Slovene American National Council?

(v) Q. Are you now or have you ever been a member of the United Committee of South Slavic Americans?

himself in readiness to answer the call to be deported when it comes" (R. 10).

Upon a motion by the government for clarification of the opinion (R. 12) and a supplemental motion by appellee to dismiss the indictment on the ground that it appeared from the face thereof that none of the questions was relevant to availability for deportation (R. 13–16), the court dismissed the indictment (R. 26). In its memorandum opinion, it reaffirmed its previous construction of Section 242 (d) as conferring on the Attorney General powers of supervision only to make certain that the alien will be available for deportation, and by that test found that none of the questions set forth in the indictment was relevant (R. 16–25).

SUMMARY OF ARGUMENT

I

The district court's holding that the questions asked of appellee exceeded the Attorney General's authority was based on the theory that the supervision and questioning of an alien who has been ordered deported can relate only to assurance of his presence for deportation when and if some nation accepts him for deportation. The court's position was based upon a misconception of the language of the statute, which imposes no such limitation, either expressly or by implication, and upon the court's failure to observe the clear congressional intent, evidenced in the legislative history, to assure detection and deterrence of further undesirable subversive conduct of the type that led to the requirement of deportation in the first place.

A. Section 242 (d) of the Immigration and Nationality Act of 1952 provides that an alien against whom a final order of deportation has been issued but whose deportation has not been effected within six months shall be subject to supervision by the Attorney General pending eventual deportation and shall, *inter alia*—

> give information under oath as to his nationality, circumstances, habits, associations, and activities, *and such other information, whether or not related to the foregoing,* as the Attorney General may deem fit and proper * * * [Emphasis added].

There is no restriction in this provision that the information shall relate solely to the availability of the alien for deportation. On the contrary, the wording shows upon its face the effort by Congress to provide for broad supervision.

Moreover, the Court in *Carlson* v. *Landon,* 342 U. S. 524, set forth the guide for ascertaining the purpose, and thus the proper area, for exercise of discretion by the Attorney General under Section 242, employing for that guide the entire structure of the statute, and of the Internal Security Act to which it is closely related. Section 242 provides for custody or bond during the deportation proceedings (subsection (a)) and during the period of six months after the order of deportation (subsection (c)). Moreover, an alien convicted of disobedience of a deportation order (under subsection (e)) may have his sentence suspended upon the basis of considerations which include "the effect of the alien's release upon the national

security and public peace or safety" and "the likelihood of the alien's resuming or following a course of conduct which made or would make him deportable."

This Court had under consideration in *Carlson* v. *Landon*, 342 U. S. 524, *supra*, the criteria for the Attorney General's action under subsection (a)—custody *before* a finding of deportability—and upheld a refusal of the Attorney General to release on bond. The Court, looking to the purposes set forth in the Internal Security Act, in which the provisions here involved had originally been enacted, held that the Attorney General's exercise of discretion could be based on a purpose to "guard against Communist activities pending deportation hearings" (342 U. S. at 544). Similarly, supervision and questioning under Section 242 (d) may be directed to that purpose.

B. The legislative history confirms what is manifest in the language and structure of the legislation. The statute was largely motivated by security problems. In 1939, when a forerunner of the present language was proposed, there was already a beginning of the security problem resulting from the inability to deport undesirables under the then wartime conditions in Europe. Aliens already ordered deported are not subject to the same deterrents as citizens who have their roots in this country or as resident aliens who still cherish the prospect of prolonged stay in the United States or possible citizenship. In the face of the rising demand for an appropriately specific remedy with respect to persons of this particular status, the earlier proposals contemplated detention as well as supervision. The provision for indefinite custody was

eliminated, but the provisions for supervision and interrogation were enacted in 1952 for the express purpose, not only of assuring the presence of the alien when and if deportation became possible, but also—and more importantly—for the purpose of preventing or at least seasonably detecting further undesirable conduct of the aliens already ordered deported.

C. If the statute is construed, as it should be, to permit questioning about harmful activities, the indictment charged an offense, at the very least, by reason of the refusal to answer the questions:

> Since the order of deportation was entered in your case on June 25, 1953 have you attended any meeting of the Communist Party of the U. S. A.?
>
> Are you now a member of the Communist Party of the U. S. A.?

The answers to these questions were of plain importance, in light of the Congress' concern with the Communist Party's hold upon aliens within the United States and the Party's extensive derivation of support from such aliens. Since such activity was the basis of appellee's deportation, the government had the right to limit his further activities in that field and to question him with respect thereto.

II

The District Court's construction of the statute, so at variance with the expressed Congressional intent, is not necessary on the theory that such construction is required to save the constitutionality of the statute. There is no warrant for the assumption by the court

that if the right to question is not limited to availability for deportation the alternative is unfettered discretion in the Attorney General to ask any questions whatsoever. The government's position is that the conditions of supervision, and the right to question with regard to compliance therewith, are limited by the guides set forth in the statute and recognized by this Court in *Carlson* v. *Landon*, 342 U. S. 524. Those guides, however, permit supervision and questioning, not only to assure availability for deportation, but also for control of harmful activities, including activities in support of the Communist Party.

Such supervision involves an element of compulsion considerably less severe than the physical restraint which was considered as an alternative means of protecting the public interest. This limited degree of compulsion, however, presents no such constitutional difficulty as would justify reading the statute contrary to the clear legislative intent. Deportable aliens, who would not be here at all except for the fact that it has proved impossible to deport them, can properly be treated as a special class, subject to the supervision here imposed.

At a time when citizens of the United States (and resident aliens) are subjected, under the selective service system, to much more extensive requirements as to registering, furnishing information, and leaving their homes for training and service, Congress can reasonably authorize a method for maintaining careful, current information as to the activity of an alien

who has been associated with the Communist Party and has, indeed, been ordered deported for that reason. The restraints imposed on this class of aliens are reasonable in relation to the problem.

ARGUMENT

I. AN ALIEN ORDERED DEPORTED BECAUSE OF MEMBERSHIP IN THE COMMUNIST PARTY, BUT UNABLE TO BE DEPORTED AND THEREBY UNDER SUPERVISION OF THE ATTORNEY GENERAL, IS REQUIRED UNDER SECTION 242 (D) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 TO FURNISH INFORMATION NOT ONLY CONCERNING HIS AVAILABILITY FOR DEPORTATION, BUT ALSO CONCERNING HIS CURRENT COMMUNIST PARTY ACTIVITIES OR ASSOCIATIONS

Section 242 (d) of the Immigration and Nationality Act of 1952, *supra*, pp. 2–3, provides that an alien against whom a final order of deportation has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations, *supra*, pp. 4–5, are required by the statute to include provisions that the alien appear from time to time for identification, that he submit to medical and psychiatric examination if necessary, and that he give information under oath "as to his nationality, circumstances, habits, associations, and activities" and "such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." The regulations must also require the alien "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case."

It is the position of the government that the foregoing provisions, both in their broad inclusive wording and in their position as a part of a comprehensive statutory structure for safeguarding the internal security of the United States, authorize not merely a mechanism for assuring the continued availability of the alien for deportation, but also a method by means of which the undesirable conduct which led to the alien's deportation in the first place will be detected if repeated during his prolonged stay in the United States. This conclusion is fortified by the legislative history of the statute and prior decisions of this Court.

A. THE BROAD STATUTORY LANGUAGE REQUIRING THE ALIEN TO FURNISH INFORMATION DURING THE PERIOD OF SUPERVISION IS NOT LIMITED, EITHER BY EXPRESS CONDITION OR BY IMPLICATION, TO INFORMATION CONCERNING AVAILABILITY FOR DEPORTATION, BUT ALSO REQUIRES INFORMATION CONCERNING ALL THE OBJECTIVES OF THE SUPERVISION, INCLUDING DETECTION OF FURTHER COMMUNIST PARTY ASSOCIATIONS

The statute is completely devoid of language restricting the purpose of the supervision to assuring the alien's availability for deportation during the period of his stay in the United States after it has developed that the order of deportation cannot be promptly executed. On the contrary, the language, particularly the provision that the alien give "*such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper*" [emphasis added], is of eloquent breadth. By its comprehensiveness, it gives evidence of a purpose to grant the Attorney General broad discretion to draft orders of supervision to meet the difficult situation arising from the fact that aliens already

found undesirable may nevertheless remain in the United States for an indefinite period of time, with the resultant opportunity to continue the very activities which occasioned the orders of deportation, and without the deterrents inherent in a citizen's responsibilities or in a resident alien's fear of deportation.

Moreover, Section 242 (d) is only one of a related group of provisions, involving supervision (and in some instances detention) of an alien thought or adjudged to be deportable, all of which are illumined by Section 2 of the Internal Security Act of 1950, *supra*, pp. 3–4.

Subsection (a) of Section 242 provides that, pending a determination of deportability, the alien may be held in custody, released under bond on "such conditions as the Attorney General may prescribe," or released on parole, such bond or parole to be revocable by the Attorney General "in his discretion".[3] Subsection (c) provides that, upon a final order of deportation, the Attorney General shall have a period of 6 months within which to effect the alien's departure, during which period, "at the Attorney General's discretion", the alien may be detained, released on bond on "such conditions as the Attorney General may prescribe", or released "on such other condition as

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[3] The text of subsection (a) [66 Stat. 208, 8 U. S. C. 1252 (a)] is as follows:

"Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody, or

the Attorney General may prescribe".[4] There follows subsection (d), here involved, providing for the period subsequent to the 6 months period. In this instance the possibly protracted period of the alien's stay is not subject to outright custody, but supervision is continued and requirement is made in the broadest possible statutory terms for the furnishing of information by the alien. The provisions for supervision and the furnishing of information, where there is to be no detention, are therefore quite clearly an attempt to accomplish, in a modified form, the same objectives as would justify absolute detention in the earlier stages of the proceedings. As we discuss more fully below, this Court has already held, in *Carlson* v.

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(2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability."

[4] The pertinent text of subsection (c) [66 Stat. 210, 8 U. S. C. 1252 (c)] is as follows:

"When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court,

Landon, 342 U. S. 524, that a legitimate objective of detention of aliens pending deportation proceedings is to prevent aliens deemed deportable for Communist activities from continuing activities detrimental to the internal security of the United States.

That this is one of the purposes of supervision is made even clearer by subsection (e), making an alien's obstruction of his deportation a felony but providing for the court's suspension of sentence and release of the alien upon taking into account the factors, *inter alia* (66 Stat. 211, 8 U. S. C. 1252 (e)), of:

* * * * *

(2) the effect of the alien's release upon the national security and public peace or safety;

(3) the likelihood of the alien's resuming or following a course of conduct which made or would make him deportable;

* * * * *

---

within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. * * *."

There is thus apparent within the confines of Section 242 a clear pattern of concern not alone with the alien's availability for deportation, when and if that can be accomplished, but with the danger of harmful conduct meanwhile. The danger specifically mentioned among the criteria set forth in subsection (e) above is assuredly encompassed by the broad discretion granted by the cognate subsection (d).

The government does not contend that the Attorney General may inquire into all phases of the life of an alien subject to supervision. The contention is that he may properly seek to control, and to obtain information as to, the kind of activities which, while deportation was pending, he could validly consider in determining whether to subject an alien to full detention. And in making that determination, before or after the order of deportation, he may properly be guided by the findings in Section 2 of the Internal Security Act of 1950 as to the nature of the Communist movement and the relation of aliens with respect to that movement (*supra*, pp. 3–4).

The relationship between the dangers of Communist activities as set forth by Congress in Section 2 and the protective provisions with respect to deportable aliens has been fully recognized by this Court. In *Carlson* v. *Landon*, 342 U. S. 524, the Court was dealing with the denial of bail by the Attorney General while the deportation proceeding was in progress. At that stage, the prospect of further harmful conduct by the alien was assuredly less than would be the case after the determination of deportability, when—as here—the alien's stake in the United States

has been virtually eliminated by the final determination.[5] In *Carlson* v. *Landon*, as here, it was contended that there was no evidence to justify a fear that the aliens would not be available for deportation (342 U. S. at 534). Mr. Justice Reed, speaking for the Court, adverted to the fact that "aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings" (342 U. S. at 538), and stated, further, in determining whether sufficient standards had been set for the Attorney General's exercise of discretion (342 U. S. at 542–544):

> * * * It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections. * * *
>
> * * * The legislative judgment of evils calling for the 1950 amendments to deportation legislation is set out in the introductory sections of the Subversive Activities Control Act. So far as pertinent to these proceedings, the new legislation was designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain noncitizens, including members of the

[5] The statutory provision involved in *Carlson* v. *Landon* was Section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 54 Stat. 1238, 57 Stat. 553) as amended by Section 23 of the Internal Security Act of 1950 (64 Stat. 1010). Congress by reenacting this provision in the 1952 Immigration Act subsequent to the decision in *Carlson* v. *Landon*, can be considered as approving its interpretation by the Court.

> Communist Party. When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. * * * The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act *to guard against Communist activities pending deportation hearings.* * * * [Emphasis added.]

Similarly, Mr. Justice Frankfurter, in his dissent (in which Mr. Justice Burton joined), stated (342 U. S. at 563):

> The factors stated by the Second Circuit in the *Potash* case, *supra*, at 751, which guided the enactment, are presumably the standards which Congress expected to be observed: "The discretion of the Attorney General * * * is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, *the danger to the public safety of his presence within the community*, and the alien's availability for subsequent proceedings if enlarged on bail." [Emphasis added.]

While Mr. Justice Frankfurter concluded that no sufficient danger to the community had been shown in that case (342 U. S. at 564), the dissenting opinion is in accord with the majority opinion of Mr. Justice Reed in looking to the entirety of the statute as guiding the discretionary power of the Attorney General. Both recognize that the statutes, viewed as a whole,

give authority for detention not merely to assure the alien's availability for deportation, but also to prevent further harmful activity by the alien. Those are the criteria which Congress intended to apply to supervision and questioning under Section 242 (d).

B. THE LEGISLATIVE HISTORY CONFIRMS THAT SECTION 242 (D) AUTHORIZES THE DEMAND OF INFORMATION CONCERNING COMMUNIST PARTY ASSOCIATIONS

The legislative history confirms, what the face of the statute reveals, that an important object of the legislation concerning supervision of aliens whose deportation can not be effected promptly is to prevent them from using the period of their stay in this country to the detriment of the internal security of the United States.

As early as 1939, Representative Hobbs advocated legislation for the detention of aliens whose deportation could not be effected, with provision for release upon good cause shown, of which one of the considerations was "(2) the likelihood of the alien's resuming the course of conduct which made him deportable". 84 Cong. Rec. 5179.* The debate then, as later (see *infra*, pp. 24–27), disclosed sharp concern with possible harm to the United States pending deportation. It was in this vein that Representative Hobbs, at this very early stage, strongly declared (see 84 Cong. Rec. 5178):

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* H. R. 4768 and H. R. 5526, 76th Cong., 1st sess., introduced respectively on March 4 and April 4, 1939 (84 Cong. Rec. 5175) were characterized as of the same effect as H. R. 5643, introduced on April 10, 1943. The text of H. R. 5643 appears at 84 Cong. Rec. 5179, 5183, 5189–5191.

> It is said that the present law is sufficient. Sufficient for what? Sufficient to promote continuation of the pollution and poisoning of the blood stream of the body politic of this Nation * * *.[7]

H. R. 5643 was passed by the House (84 Cong. Rec. 5192) but was not reached in the Senate (see 84 Cong. Rec. 9372). A similar bill (H. R. 3) was introduced in the 77th Congress, but did not obtain final consideration.[8] Another bill, H. R. 6333, 80th Cong., 2d sess., introduced by Representative Hobbs on April 26, 1948, did not reach the stage of hearings. However, with H. R. 10, introduced in the 81st Congress, 1st session, more extensive congressional action ensued.[9]

As introduced on January 3, 1949, H. R. 10 provided for detention as well as supervision and, in the section requiring the alien to furnish information, provided that the alien should "give information under oath as to his circumstances, habits, associations, and activities" (p. 4, lines 16–17). When the bill was reported

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[7] The reports (H. Rep. No. 397 and S. Rep. No. 761, 76th Cong., 1st sess.) were very brief but noted: "460 aliens still live in America who, during 1938, were adjudged unfit to remain here * * *. The vast majority of these aliens are as free as any citizen" (page 1 of each report). The minority report recognized the issue, although it noted the lack of evidence that any of these aliens "are a menace to the United States or the peace and safety of our citizens." H. Rep. No. 397, pp. 3–4.

[8] See H. Rep. 284, 77th Cong., 1st sess.; H. Rep. 698 on recommittal, 77th Cong., 1st sess.

[9] S. 1987, a similar bill introduced in the Senate on June 6, 1949, was referred to committee but not acted upon. 95 Cong. Rec. 7218.

by the House committee on August 4, 1949 (H. Rep. 1192, 81st Cong., 1st sess., p. 2), the phrase concerning the furnishing of information was supplemented by the additional, present language:

> and such other information whether or not related to the foregoing as the Attorney General may deem fit and proper; * * *.

The congressional committee reports make no specific reference to this addition, but its comprehensive language is consistent with the numerous expressions, in the reports and hearings, of great concern over the fact that known criminals and Communists, who could not be deported because their countries refused to receive them, were continuing their activities without restraint. Thus, the following appeared in the House committee report (H. Rep. No. 1192, 81st Cong., 1st sess.):

> * * * * The bill will expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody, or to release them under bond or on conditional parole, pending final determination of their deportability and for a 6-month period after an order of deportation is issued and while such negotiations take place. The bill further provides that among the conditions of any bond exacted, or in the terms of release on parole, there shall be a condition that the alien shall be produced when required for defense against the charges upon which he appears to be deportable and for deportation if he is found subject to that action. A similar provision relates to release on bond or parole for 6 months after the alien has been ordered deported. *These provisions, of course,*

> *enumerate only one of the conditions which is mandatory in the bond or as a parole condition. The bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond or parole agreement which he may see fit to include.* * * * The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien and for 6 months after an order of deportation has been issued against him. * * *
>
> Subsections (b) through (f), inclusive, of section 20 of the 1917 act, as proposed in the bill, introduce a new procedure whereby statutory authority is granted to the Attorney General to *continue* his control over aliens ordered deported * * *. [Pp. 6–7. Emphasis added.]

After reviewing the statistics as to unenforceable orders of deportation, the report states:

> * * * The situation has now become so serious, with every indication that it will increase rather than diminish in importance, that the committee feels that the enactment of legislation of this type is a necessity, *not only to the proper administration of the immigration laws but from the standpoint of the national security of the United States.* [Pp. 7–8. Emphasis added.]

And see the letter of the Attorney General to the committee, cited in the foregoing report at p. 12, and in the Hearings before Subcommittee 1, House Judiciary Committee on H. R. 10, 81st Cong., 1st sess.: "[T]he enactment of legislation of this type is a

necessity, not only to the proper administration of the immigration laws, but from the standpoint of the security of the United States" (p. 6).

The report of the Senate committee on H. R. 10 was subsequent to the outbreak of hostilities in Korea. S. Rep. No. 2239, 81st Cong., 2d Sess., August 3, 1950. The bill had been amended in committee to delete the Attorney General's power to detain for an indefinite period, doubts having been expressed as to the constitutionality of detention (*ibid.* p. 8). The purpose of the bill was restated to be (*ibid.* p. 3):

> so that there may be more effective control over deportable aliens who cannot be deported for reasons beyond the control of the United States.

The report repeated the language of the House committee report *supra* (pp. 24–25) summarizing the effect of the bill as enabling the Attorney General to continue his control over the aliens, setting forth the great number of aliens involved, and stating the serious necessity of the legislation "not only to the proper administration of the immigration laws, but from the standpoint of the national security of the United States". S. Rep. No. 2239, 81st Cong., 2d sess., p. 6.

On August 8, 1950, the President directed a recommendation to the Congress for legislation to protect the internal security of the United States, including a recommendation (H. Doc. No. 679, 81st Cong., 2d sess., p. 5)—

> that the Congress enact legislation permitting the Attorney General to exercise supervision over aliens subject to deportation and to require

> them, under the sanction of criminal penalties, to report their whereabouts and activities at regular intervals. * * *

H. R. 10 was thereupon integrated with other bills to form S. 4037, the Internal Security Act of 1950. S. Rep. No. 2369, 81st Cong., 2d sess., p. 3. The purpose was again stated—as it was also later stated in the conference report—to be "more effective control over deportable aliens". *Ibid.*, p. 14; H. Rep. No. 3112, 81st Cong., 2d sess., p. 59. Significantly, the minority views of the Senate committee embodied no objection to these provisions for control, but characterized them as follows (S. Rep. No. 2369, 81st Cong., 2d sess., Part 2, Minority Views, p. 4):

> * * * Section 23 permits the Attorney General to exercise supervision over aliens subject to deportation and to require them, under the sanction of criminal penalties, to report their whereabouts and activities at regular intervals. These modifications of existing law simply and directly furnish the added measure of *protection* which the existing situation demands. They do so in conformity with the Constitution, and they should be enacted into law. [Emphasis added.]

Similarly, the Presidential veto was not directed against these provisions (H. Doc. No. 708, 81st Cong., 2d sess., p. 3), and a substitute bill proposed by Senators Kilgore, Douglas, Humphrey, Lehman, Graham, Kefauver, and Benton, employed the identical language as to the giving of "information under oath as to [the alien's] nationality, circumstances, habits, associations, and activities, and such other information

whether or not related to the foregoing as the Attorney General may deem fit and proper" (Amendments in the Nature of a Substitute for S. 4037, introduced on September 6, 1950).[10]

The reports indicate that the legislators had before them an array of case histories, including specific examples of a Communist continuing his activity, and of various criminals repeating their offenses (H. R. No. 1192, 81st Cong., 1st sess., pp. 8–9), all attesting the possibility of deportees repeating and continuing their activities. The bill, as passed on September 23, 1950, and, later, as a part of the Immigration and Nationality Act of 1952,[11] was accordingly the product of a clearly expressed purpose, not merely to assure the alien's appearance for deportation, when and if that should become possible, but also, and more importantly, to facilitate supervision of the activities of released deportable aliens. The requirement for information in Section 242 (d) should accordingly be recognized as designedly broad language which should be made effective with respect to the protective purpose indicated by the legislative history. The Attorney General was given broad powers to supervise and gain information which would enable him to make

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[10] There was ample notice to the legislators of the breadth of discretion proposed to be vested in the Attorney General by this legislation. See H. Rep. 1192, 81st Cong., 1st sess., Minority Views, p. 19; Hearings before Subcommittee 1, House Judiciary Committee on H. R. 10, 81st Cong., 1st sess., p. 29 (Statement of Americans for Democratic Action).

[11] H. R. 5678, 82d Cong. 1st sess.; H. Rep. No. 1365, 82d Cong., 2d sess., pp. 30, 58–59; S. 2250 and S. Rep. No. 1137, 82d Cong., 2d sess., p. 31.

certain that aliens who had already been found to be deportable did not use the period of further residence for continuation of detrimental activities.

This, in the minds of the legislators, must have been the objective of the requirement for information as to "circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper".

C. THE INDICTMENT CHARGES REFUSAL TO ANSWER QUESTIONS THAT WERE WITHIN THE PROPER SCOPE OF INQUIRY

The indictment which the District Court dismissed charged refusal by appellee to answer 22 questions. Under what we think is the proper construction of the statute, discussed, *supra*, pp. 14–29, the indictment charged an offense, at the very least, by reason of the refusal to answer the two questions:

> Since the order of deportation was entered in your case on June 25, 1953 have you attended any meeting of the Communist Party of the U. S. A.?
>
> Are you now a member of the Communist Party of U. S. A.?

These questions were manifestly of importance to the Attorney General's supervisory duties. Appellee had been ordered deported because of his membership in the Communist Party. The Congress had specifically expressed its concern and enacted special legislation with respect to the problem intrinsic in the Communist Party's hold upon aliens within the United States, and its derivation of support from such aliens (*supra*, pp. 3–4). The Attorney General

had been vested with special authority and a corresponding responsibility to supervise aliens of this class when the potent deterrent of endangering a further stay in the United States had been removed by an order of deportation. An alien, who might otherwise consider that he had little left to lose by actual subversive activity, might yet be deterred by the realization that the likelihood of detection and criminal punishment was now substantially increased since he could be called upon to give an accounting of his current conduct. The fact that an alien might choose to assert the privilege against self-incrimination (no such privilege was here asserted) does not lessen the fact that the information sought was well within the scope of what the Attorney General was entitled to ask.

The remaining questions, concerning acquaintance with certain individuals and concerning possible indirect or direct support of the Party or allied enterprises (*supra*, p. 7, fn. 2), are useful in a determination of the truthfulness of the other questions, in addition to their evidentiary value in disclosing the appellee's activities. Whatever issue may be raised as to any particular question is a matter to be resolved at the trial. All that the Court is required to decide here is whether, under a proper construction of Section 242 (d), the Attorney General may properly direct inquiry to an alien ordered deported concerning his activities in support of the Communist Party. As shown above, Congress clearly contemplated that the Attorney General should have that power.

II. SO INTERPRETED, THE PROVISION FOR SUPERVISION AND QUESTIONING OF ALIENS ORDERED DEPORTED IS CONSTITUTIONAL

The court below seems in part to have reached the result it did on the theory that its construction of Section 242 (d), as limiting supervision to promoting the alien's availability for deportation, was necessary to avoid constitutional issues. And that theory, in turn, seems to rest on the assumption that, if the questioning of the alien is not restricted to the single matter of assuring the alien's presence for deportation, the legislation would "give an official the unlimited right"—an unconstitutional right—to ask "any question the official may decide to ask" (R. 22).

No such assumption is warranted. The alternative to questioning concerning availability for deportation is not unlimited questioning. The proper analysis consists in looking, as the Court did in *Carlson* v. *Landon*, 342 U. S. 524, to the language and purpose of the enactment for the limitations on the Attorney General's discretion.

In *Carlson*, where this Court was examining the very statute here involved, prior to its reenactment in 1952, in relation to the power of the Attorney General to *hold* the alien in actual custody *before* there had even been the finding of the offensive conduct leading to deportability, the Court found a standard in the policy of the Internal Security Act "to guard against Communist activities pending deportation hearings", 342 U. S. at 543–544. See also *supra*, pp. 20–22. *A fortiori*, this Court's language as

to the Attorney General's discretion concerning holding in custody is here applicable to the lesser matter of supervision and inquiry (342 U. S. at 542):

> It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections.

On the basis of the same standard, the government's position is, as stated above, that the supervision and inquiry powers conferred by Section 242 (d) are intended to provide a means, not only to make certain that the alien will be available for deportation, but also to prevent the alien who has been found to be an undesirable resident from using the period of prolonged stay in the United States to continue the very type of activities which rendered him deportable.

This does involve a certain degree of compulsion, not imposed upon ordinary resident aliens or citizens except to the degree that the harmful conduct may also be a crime. But the compulsion is much less severe than that involved in actual detention which was considered by Congress as an alternative means of protecting the public interest. To the limited extent that this compulsion raises a constitutional issue, it is the same issue which was before this Court in *Nukk* v. *Shaughnessy*, 350 U. S. 869, and not there decided. Congress has expressed its view of the constitutionality of this provision thus (H. Rep. 1192, 81st Cong., 1st Sess., p. 10, referring to the statute when it still had a provision for complete detention):

> The committee feels that aliens illegally here are not necessarily entitled to enjoy precisely the same privileges as those who are lawfully resident, merely because of the inability of this Government to carry out its policy to rid the country of their presence in conformity with law. If deportation proves impossible, it seems reasonable that subversive, criminal, immoral, and other undesirable persons should be subject to supervision and control by the Government in order that their activities and conduct may be known.

Several considerations are of importance in support of this congressional position. First, it is to be kept in mind that appellee at no point contends that he is not rightfully being deported, nor does he claim that the administrative proceedings in which he was ordered deported were procedurally defective or unlawful in any manner. The status of appellee as an undesirable alien under order of deportation is accordingly clear and uncontroverted. Secondly, this status sets appellee substantially apart from citizens and other resident aliens. While Congress has determined that he should not be here, he is in fact here and may remain for some period of time. His status is closer to that of an excluded alien on parole than it is to the ordinary resident alien. If, as must be conceded, Congress has the power to expel him from the country entirely, it must have the power to deal with the situation presented by the inability to effectuate deportation.

The power of Congress with respect to aliens is recognized as extremely broad. So long as aliens fail

to become naturalized, they "remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson* v. *Landon,* 342 U. S. 524, 534, citing *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Fong Yue Ting* v. *United States;* 149 U. S. 698, 707; *Bugajewitz* v. *Adams,* 228 U. S. 585; *Ng Fung Ho* v. *White,* 259 U. S. 276, 280; *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 318; *Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, 528; III Hackworth's *Digest of International Law* 725 (1942). See also *Galvan* v. *Press,* 347 U. S. 522. The action here involved is merely supplemental to this far more drastic procedure, the constitutionality of which is beyond question.

The legislative and executive branches of the government are confronted with concrete, actual problems. Not only does a person in appellee's status have an unusually strong motivation to disappear into the general population of the country in order to avoid deportation, but in addition such an alien, with deportation having been ordered, is relieved of one of the deterrents—and perhaps the most potent deterrent—to further support of the Communist Party, *i. e.,* the fear of deportation. The authorities cannot discharge the responsibility resting upon them by a mere acceptance of the assurances of deportee aliens that they will not participate in subversive activities. It is reasonable to restrict the aliens' associations with or employment by members of the Communist Party, and to permit inquiry as to

whether such limitations are being observed. At a time when it remains necessary to call citizens into the armed forces of the nation, involving for such citizens grave impact upon their customary liberties, it is not unreasonable to provide for supervision of aliens whose past record discloses a contribution to the source of the current danger.

The short of it is that the special status of deportable aliens who have not yet been deported justifies some form of special treatment. The treatment specified by Congress, which is not detention but limited supervision, is reasonable. Supervision which is substantially less burdensome than that normally imposed on members of the armed forces cannot be equated to a real administrative deprivation of liberty such as the imprisonment and hard labor provision of *Wong Wing* v. *United States,* 163 U. S. 228, referred to by the court below. Appellee, who after full and fair hearings has been found undesirable as a permanent resident of the United States, is a part of a group more properly comparable to excludable aliens than to the ordinary resident alien. The limited supervisory precautions taken with respect to him, to the restricted extent that they may affect his liberty, are justified by his special position in our society and the counterbalancing necessity to prevent or at least warn of further conduct harmful to the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 295

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE UNITED STATES

The appellee, choosing to rely entirely on the opinion of the court below (Br. 8–10), has presented no argument to support the construction of the statute as limiting the supervisory power of the Attorney General to insuring the availability of the alien for deportation. We have discussed that holding in our main brief (Gov't. Br. 14–30). The appellee does urge that the statute is unconstitutional in a number of respects and this brief will be devoted to replying to those arguments.

I. There has been no infringement of the right of free speech under the First Amendment

The contention that questioning about membership in, and support of, the Communist Party is prohibited by the First Amendment has been too often rejected to require discussion now. *E. g., American Communications Association* v. *Douds,* 339 U. S. 382; *Adler* v. *Board of Education,* 342 U. S. 485; *Barsky* v. *United States;* 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843.

The appellee, however, argues that the scope of questioning permitted the Attorney General is not limited by the statute and that an unrestricted power to require answers to any question, however irrelevant, is an infringement of free speech (Br. 10–14). Whether or not this argument would be sound if the Attorney General had been granted unrestricted scope to his questioning, such is not the case. Just as in *Carlson* v. *Landon,* 342 U. S. 524, where the power to detain was construed in the framework of the legislation, so here the right to question is to be read as limited to questions relevant to the purposes of the supervisory power. This Court, in *Carlson* v. *Landon,* found that, in connection with deportation proceedings based upon Communist activity, the authority of the Attorney General to detain gained definiteness from the policy of the statute "to guard against Communist activities pending deportation hearings." 342 U. S. 524, at 544. So, here, the right to question is not unlimited but is determined by the framework of the statute and the nature of the grounds for deportation in the particular case.

The final order for deportation was not introduced in evidence in this case and appellee argues that we may not refer the Court to its terms (Br. 1–2). There was no opportunity to make formal proof of the terms of the order since this case arose on a motion to dismiss the indictment. However, it is clear that the court below could, and this Court can, take judicial notice of the final order of the Board of Immigration Appeals since it is a public official document. *United States* v. *Teschmaker,* 22 How. 392, 405; *Coffee* v. *Groover,* 123 U. S. 1, 11; *Jones* v. *United States,* 137 U. S. 202, 214; *Knight* v. *United States Land Association,* 142 U. S. 161, 169; *New York Indians* v. *United States,* 170 U. S. 1, 32; *Caha* v. *United States,* 152 U. S. 211; *Dennis* v. *United States,* 339 U. S. 162. For the convenience of the Court we have printed the Board's opinion as an Appendix to this brief, *infra,* pp. 13–14. It is clear from that opinion that deportation was based on the specific finding that the appellee was a voluntary member of the Communist Party from at least 1940 to at least 1949 (*infra,* p. 14). Since that was the basis of the order, the supervisory order may, under the reasoning of *Carlson* v. *Landon,* relate to the possible continuation of that activity, and the questions to be asked by the Attorney General are permissible if they are pertinent in that respect.

II. The statute is not void on the basis that it is vague and indefinite nor as an unlawful delegation of legislative power

As a variation on the theme that the unlimited power of the Attorney General is in violation of the First Amendment, appellee also argues that the statute

is vague and indefinite (Br. 14–19) and is an unlawful delegation of legislative authority (Br. 42–44). In these forms, the argument is again dependent on taking the words of the statute out of context and assuming that the powers of the Attorney General are in no way limited by the purpose of the legislation and the nature of the deportation order. But this Court has frequently held that in order to avoid a serious question of constitutionality on the basis of vagueness, the words of a statute should be given a restricted reading drawn from the framework of the entire law. *Screws* v. *United States,* 325 U. S. 91; *United States* v. *Harriss,* 347 U. S. 612, 618.

And this Court considered a similar argument on the issue of an unlawful delegation of legislative authority in *Carlson* v. *Landon,* 342 U. S. 524, and rejected it, stating at pages 542–544:

> * * * We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. * * *
>
> * * * The legislative judgment of evils calling for the 1950 amendments to deportation legislation is set out in the introductory sections of the Subversive Activities Control Act. So far as pertinent to these proceedings, the new legislation was designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of cer-

tain noncitizens, including members of the Communist Party. When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. Compare *Yakus* v. *United States*, 321 U. S. 414, and *Bowles* v. *Willingham*, 321 U. S. 503, 515. This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards. The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act *to guard against Communist activities pending deportation hearings.* * * * [Emphasis added.]

III. Appellee is not unconstitutionally deprived of a jury trial

The appellee claims an absence of procedural due process, as well as a violation of the right to trial by jury under the Sixth Amendment, on the ground that the administrative finding of deportability may be used against him at trial without his having a jury determination of the facts underlying that finding (Br. 19–22). This misconceives the terms of the crime as established by Congress. Section 242 (d) of the Immigration and Nationality Act of 1952 does not make it a crime to be deportable; it provides that certain willful conduct by an alien after he has been ordered deported shall be a crime.

The law is replete with instances in which a status or duty is established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Such legis-

lation is not to be invalidated upon the theory that the crimes peculiarly associated with the specific status or duties may later indirectly rest upon the original administrative determination of that status. Thus, a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body.

A significant analogy is found in the selective service legislation. The hundreds of thousands of draft classifications have not been established by jury trials; yet refusals to comply with requirements of the classifications have been made crimes by statute, and the validity of the legislation has been upheld. As observed by this Court in *Cox* v. *United States*, 332 U. S. 442, 453:

> * * * The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. * * *

Freight tariffs or price controls established by administrative proceedings have long been upheld. In *Yakus* v. *United States*, 321 U. S. 414, 444–445, this Court stated:

> * * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of vio-

lation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

* * * * * * *

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6 (7), 10 (1); *Armour Packing Co.* v. *United States,* 209 U. S. 56, 81; *United States* v. *Adams Express Co.,* 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. [citing decisions] * * *

In short, there is no constitutional objection to the imposition of duties or consequences in connection with administrative findings.

Wong Wing v. *United States,* 163 U. S. 228, relied upon by appellee (Br. 20), affords enlightening contrast rather than support for appellee's position. Under the statute involved in *Wong Wing* the question of whether an alien wilfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an or-

der of unlawful residence resulted, under the statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U. S. at 237). There is a clear and fundamental difference between a provision under which an administrative finding automatically imposes punishment, and provisions, as in the instant statute, granting authority for the administrative determination of status and the imposition of supervisory requirements relevant to that status, and providing for criminal punishment only upon judgment in a criminal trial that the supervisory requirements have been wilfully violated.[1]

IV. The statute is not a bill of attainder nor an ex post facto law

The argument that the statute constitutes a bill of attainder and an *ex post facto* law (Br. 22–23) seeks to relate the criminal penalties imposed upon conduct of deportable aliens back to the deportation order, and to challenge the constitutionality of Section 241 of the Immigration and Nationality Act, 66 Stat. 204, 8

[1] There is not involved here the problem, injected by appellee (Br. 19–22), which is raised in the dissenting opinion in *United States* v. *Spector*, 343 U. S. 169, 174–180, of whether, in a criminal prosecution for violation of the conditions of supervision, appellee would have the right to contest the validity of the deportation order. Under the Selective Service law the legality of the draft classification is passed on by the court, not the jury, in the criminal case. That problem is to be met when and if it arises. The only issue is whether, on the basis of a finding of deportability, appellee can be subject to reasonable regulation based on the status of deportability. Under the decisions cited above, he is subject to such regulation, even though the status of deportability was administratively determined.

U. S. C. 1251, which designates membership in the Communist Party as a basis of deportation. It is based on the theory which we have shown to be erroneous that the criminal penalties are imposed in punishment of the acts leading to deportation rather than—as is actually the case—for acts done in violation of the supervisory restrictions imposed after the order of deportation has become final. Moreover, to the extent that appellee does challenge the deportation order, he is merely attempting to reargue issues determined against his position in *Galvan* v. *Press*, 347 U. S. 522, *Harisiades* v. *Shaughnessy*, 342 U. S. 580, and *Marcello* v. *Bonds*, 349 U. S. 302, 314.

V. The statutory provision for supervision and questioning does not constitute a deprivation of liberty, a punishment, nor an invasion of the province of the states

The appellee presents a series of arguments, with variations in phraseology, alleging interference with liberty (Br. 23–28), punishment (Br. 35–40), and invasion of states' rights (Br. 28–34), all of which constitute in effect a due process argument that the restrictions placed on appellee by the supervisory order are a denial of rights guaranteed by the Fifth Amendment. The answer to these arguments is presented in our main brief (Govt. Br. 31–35). The supervisory power is, like the power to detain, upheld in *Carlson* v. *Landon*, 342 U. S. 524, an incident of the power to deport. Congress has decreed that aliens shall not engage in certain conduct without being subject to deportation, and this Court has upheld that as constitutional. *Galvan* v. *Press*, 347

U. S. 522. In *Carlson,* the Court upheld the right of the government physically to detain an alien to prevent his engaging in such activity. Certainly this milder form of restraint, made necessary only by the fact that an alien found to be deportable has not been removed, is *ipso facto* reasonable. It is not intended as punishment, but as a restraint on unacceptable activity. It is imposed only on those who have been administratively determined to have engaged in the activity in the past. If they do not desire to continue that type of activity there is a minimum of interference with their current mode of living. It does impose a very real restraint on an alien who desires to continue in the activity which has led to his being deported, but even in that case it is, unless he violates the order, not a punishment but a regulation of his conduct.

Actually, the type of regulation here involved differs not in kind, but only in degree, from the registration of all aliens required by Section 262 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1302). That type of registration was upheld by implication in *Hines* v. *Davidowitz,* 312 U. S. 52. Since such regulation is constitutional with respect to aliens generally, the regulation here involved cannot be said to be unreasonable.

VI. The statute does not deny the appellee equal protection of the laws

The appellee's argument on equal protection (Br. 40–42) answers itself in its admission that a law is unconstitutional on that basis only when it creates

"arbitrary or unreasonable classifications and impose[s] upon such classes special burdens or obligations." It cannot be held to be arbitrary or unreasonable to treat as a class, for the purpose of supervision and reporting, aliens who have been ordered deported because they have been found to have engaged in activities which Congress believed were a peril to the safety of this country.[2]

CONCLUSION

The constitutional basis underlying this statute was stated in the government's main brief (p. 35): Appellee, who after full and fair hearings has been found undesirable as a permanent resident of the United States, is a part of a group more properly comparable to excludable aliens than to the ordinary resident alien. The limited supervisory precautions taken with respect to him, to the restricted extent that they may affect his liberty, are justified by his special position

---

[2] In the last point in his brief, the appellee attacks the sufficiency of the indictment on the ground that the statute applies only to deportations under a particular statute and the indictment does not allege under what act the appellee was being deported (Br. 44–47). This argument seems to be based on a misreading of the statute, since it contains no requirement that the deportation be ordered under any particular act. See Section 242 (d), as set forth in our main brief, pp. 2–3. If the argument is to be construed as an attack on the indictment on the ground of indefiniteness, the answer is that the indictment does refer to a specific deportation order by date and thus gives the appellee all the information there is with respect to the charge against him. Cf. *Hagner* v. *United States*, 285 U. S. 427, 431; *Debrow* v. *United States*, 346 U. S. 374, 378. In any event, the sufficiency of the indictment is not an issue to be raised on an appeal to this Court under 18 U. S. C. 3731. *United States* v. *Harriss*, 347 U. S. 612, 617.

in our society and the counterbalancing necessity to prevent or at least warn of further conduct harmful to the United States.

Respectfully submitted,

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JANUARY 1957.

APPENDIX

U. S. DEPARTMENT OF JUSTICE,
BOARD OF IMMIGRATION APPEALS

June 25, 1953.

File: E–10685—Chicago.
In re: GEORGE WITKOVICH,
in Deportation Proceedings
in Behalf of Respondent: Pearl M. Hart, Attorney,
30 North La Salle Street,
Chicago, Illinois.

CHARGES:

Warrant: Act of 1918, as amended—After entry, member of following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

Lodged: None.

APPLICATION: None.

DETENTION STATUS: Released on bond.

WARRANT OF ARREST SERVED: December 26, 1952.

This is an appeal from an order of the Special Inquiry Officer dated January 30, 1953, requiring respondent's deportation on the ground stated above. Notice of appeal bears the date of January 30, 1953. Subsequently, counsel addressed a motion to the District Director requesting a reopening of proceedings primarily on the ground that hearing was unfair because respondent was denied the right to counsel. This motion was decided by the Special Inquiry Officer on March 30, 1953, when he entered an order denying the motion.

The facts are set forth in great detail in the order of the Special Inquiry Officer and need not be repeated. Evidence of record establishes beyond dispute that the respondent, an alien who entered the United States in 1913, was a voluntary member of the Communist Party from at least 1940 to at least 1949. We find counsel's contention concerning the credibility of the witnesses used by the Government to be entirely without merit.

Counsel entered the case after the hearings were concluded. She contends that the respondent was denied the right to representation. The facts concerning this question are set forth in great detail on pages 1 and 2 of the Special Inquiry Officer's decision. We find this contention to be baseless. While it is true that respondent was confined during the time he was given a hearing and prior thereto, it is to us clear that he was properly advised of his right to counsel and given adequate opportunity to obtain counsel. On two occasions, hearing was recessed to enable him to obtain counsel and on the third occasion, a continuance was granted. It is noted that during the entire period respondent was incarcerated, his wife was at liberty to secure representations on his behalf. We note the efforts of the Service to obtain the services of an attorney from the Legal Aid Society for respondent when he claimed he was without sufficient fund. The opportunity given respondent to secure counsel was more than reasonable.

Contentions of counsel that hearing was in other respects violative of due process are without merit (*Barber* v. *Yanish*, 196 F. 2d 53, C. A. 9, certiorari denied 344 U. S. 817). The appeal must be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

/s/ THOS. G. FINUCANE, *Chairman.*

U. S. GOVERNMENT PRINTING OFFICE: 1957

Office - Supreme Court, U.S.
FILED
JAN 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 295

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLEE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 295.

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLEE.

STATEMENT.

Appellee, an alien, was indicted under Section 1252 (d) of the Immigration & Nationality Act of 1952, Title 8, United States Code, for wilful failure to answer questions contained in the indictment (R. 2).

THE GOVERNMENT HAS MISSTATED THE QUESTION PRESENTED.

At the threshold it is necessary to correct the government's statement on pages 2, 5 and 14 of its brief that the question presented i Whether an alien ordered de-

ported for membership in the Communist Party, who is subject to supervision under section 242 (d) of the Immigration and Nationality Act of 1952 pending deportation, may be questioned concerning present membership in and activities on behalf of the Communist Party and other organizations and concerning associations with particular individuals, or whether the inquiry authorized by the statute must relate solely to the alien's availability for deportation."

The indictment (R. 1) charges that the appellee was an alien against whom an order of deportation had issued, that he was required to give information under oath, as prescribed by the provisions of Title 8 U. S. Code, Section 1252 (d), and that he failed to answer certain questions. There is no more.

There is nothing in the record before this Court, except as it is gratuitously supplied by the United States Attorney (R. 27), and then in the same manner raised to the dignity of proof on page 33 of the brief that "the question presented is whether an alien ordered deported for past membership in the Communist Party who is subject to such an order of supervision, may be questioned concerning present membership in and activities on behalf of the Communist Party" etc.

The government has confused the District Court's dismissal of the indictment with a trial on the merits which has not yet been had. Page 33 of the government's brief says: "First, it is to be kept in mind that appellee at no point contends that he is not rightfully being deported, nor does he claim that the administrative proceedings in which he was ordered deported were procedurally defective or unlawful in any manner. The status of the appellee as an undesirable alien under order of deportation is accordingly clear and uncontroverted."

The case has not been tried. There has been no opportunity to contend "that he is not rightfully being deported". There has likewise been no opportunity to "claim that the administrative proceedings in which he was ordered deported were procedurally defective or unlawful in any manner." It is therefore impossible to conclude, except by tortured conjecture and for the sole purpose of fabricating an argument that "[t]he status of the appellee as an undesirable alien under order of deportation is accordingly clear and uncontroverted."

The clarity in the record is that there has been no trial on the merits, and that the facts alleged have not been proved.

Before this Court there is only the government's appeal from an order of the District Court dismissing the indictment "for the reason that none of the questions there set forth is relevant to defendant's availability to deportation." (R. 25.)

The fact is that appellee, in moving to dismiss the indictment raised the specific objection that the indictment did not set out an order of deportation sufficient to advise the appellee of the cause of the order of deportation, or what else he was obliged to meet by way of defense. (R. 3 and 4.)

The statute [8 U. S. C. Section 1251] makes about twenty-five different classes of aliens deportable—those who enter the country without inspection, those who are anarchists, those who are narcotic drug addicts who have been convicted of a violation of any law or regulation controlling narcotics, those connected with a house of prostitution or immoral place, those convicted of possessing or carrying a weapon which shoots automatically, those violating the Alien Registration Act, members of the communist party and numerous other classifications.

To say that the question presented involves an alien ordered deported for membership in the communist party is a misstatement under the record before the court.

All parties should be bound by the record.

Hence the appellee in his brief will give little scope to the references of the government to communists, citation of cases based upon communists or communism, and the conclusions of the government on what ought to be permitted in relation to them, except as it may become incidentally necessary to do so in this brief.

Appellee's brief hopes to bring to the attention of the Court the various arguments to be made on his motion to dismiss the indictment as viewed from the four corners of the indictment, to direct the Court's attention to the logic of the District Court in dismissing the indictment, and to respectfully request the Court further to consider the constitutional issues involved in this indictment, those issues having been raised in the District Court. (R. 4, 5, 6.)

Relying upon the language in *United States* v. *Spector*, 343 U. S. 169 (1952), we raise the constitutional issues in the hope that this Court will pass upon them.

SUMMARY OF ARGUMENT.

The District Court dismissed the indictment (R. 1-3) because none of the questions set forth therein were "relevant to defendant's availability to deportation" (R. 25). The theory of the Court, based on prior decisions, analogous situations and the logic of the particular circumstances of the individual case, dictated that result.

The court stated in effect that the attorney general is powerless to take any action against a person ordered deported except to deport him; that the attorney general is given power to supervise the alien to make sure the alien is available for deportation and that he has no further power (R. 10); that the questions asked must relate to the valid power of the attorney general.

Subsequently the United States Attorney asked for clarification of the court's opinion; the appellee moved the court to consider the questions in the indictment and to rule on their pertinency or relevancy to the power of the attorney general. Thereupon the court dismissed the indictment for the reasons stated (R. 25).

Appellee, of course, is in agreement with the District Court that the questions asked are not relevant to the availability of the appellee for deportation, that therefore no crime is charged in the indictment, and the indictment should be dismissed.

Since the government appealed from the order of the District Court, this appeal affords the appellee an opportunity to again raise the substantive constitutional objections which were part of his original motions to dismiss the indictment, and to urge this Court to consider them.

The objections argued in this brief to the statute and to the indictment are:

Congress attempts to create a new crime based solely on a failure to speak on matters unrelated and not pertinent to the power of the attorney general to deport, and there can be no crime for failure to speak, unaccompanied by any act forbidden by law, in an area where the law places no limitation of any kind on the scope of the inquiry.

There is a violation of appellee's rights under the First Amendment which guarantees to him freedom of speech and lawful assembly, but which are denied appellee when he is subject to imprisonment for failure to state whether he knows certain persons, for failure to state what he reads, what moving pictures he sees, what lodges he attends.

Both the statute and the indictment are too vague to charge a crime under the Fifth Amendment since the statute places no limitation upon the right of inquiry but permits the attorney general to inquire as "he may deem fit and proper". The Act provides no ascertainable standards of guilt.

The appellee is deprived of procedural due process because the Act consists of severing the issue of unlawful presence in the country for administrative determination, and the administrative determination then becomes conclusive upon the criminal court. To thus subdivide a charge against an alien avoids jury trial by submitting the vital and controversial part of the charge to administrative decision. The Act denies to appellee a jury trial to pass on the basic element of the crime charged; neither is he permitted to confront and cross-examine the witnesses against him.

The statute is contrary to the constitutional direction against bills of attainder and *ex post facto* laws.

The appellee is further denied due process in that without judicial trial he is subjected to supervision, restrictions on his right of locomotion, and interference with his normal associations and business, and he is required to conform to regulations dictated solely by the attorney general without any relevance to the particular situation of the appellee.

The statute is repugnant to the Tenth Amendment as well, because it interferes with the powers retained by the states, and also because the scheme of supervision designed by the statute is not a necessary and proper power to the right to deport.

Supervision is intended as punishment and does not serve to protect the nation or to facilitate the right to deport.

The appellee is denied the equal protection of the law not only as an alien, but by reason of the unlawful delegation of power to the attorney general who has no implied authority to repeal, extend or modify an Act of Congress.

The indictment is insufficient otherwise to charge a crime, because it fails to allege material and substantive matters which go to the gravamen of the alleged crime; the indictment does not show what order of deportation, if any, was entered, by whom, for what reasons, that the appellee had knowledge thereof, or of the orders of supervision, or that the order of deportation was under a particular statute which requires that the appellee be subject to supervision.

Point I.

THE OPINION OF THE DISTRICT COURT.

The language of Title 8 U. S. C. 1252 (d) is cited at R. 16, 17.

Appellee appeared before the Immigration Service (R. 32) and answered questions as to his place of residence, the members of his family, his work, his income, the ownership of property, what he did with his spare time, his place of employment, that he had a social security number, that he had registered as an alien, and numerous other questions, all indicating his compliance with the regulations laid down by the attorney general.

The attorney general knew at all times where the appellee could be found, knew that he had registered, that he had been reporting to the Immigration Service from time to time and that he had responded to the call of the Service.

The court below held that whether the delegation of power to the attorney general was a valid delegation can only be determined by an examination of the section in its context and the cases which have interpreted that section. The court held: "It is apparent from this summary of the deportation procedure that after the entry of a final order of deportation, the sole remaining power and duty of the Attorney General is to make sure that the alien departs from the country. It follows that the powers of supervision given him are intended as an aid in enforcing this power by making certain that the alien will be available for deportation when and if the time comes that this is possible." (R. 18, 19.)

The court also held that there is no warrant for an interpretation of the section that the attorney general may

question the alien to determine not only his availability for deportation, but also to satisfy himself that the activities for which the alien was ordered deported are not continuing.

The court further held that the court will determine the relevancy of the questions by a definite standard: do they assist the attorney general in making certain that the alien will be available for deportation.

Subsequently the appellee requested the court to examine the questions set forth in the indictment and to dismiss the indictment for the reason that it is apparent that none of the questions is relevant to his availability for deportation. (R. 22.)

The court found that such procedure is dictated by analogous situations in other fields such as determining whether or not the privilege against self-incrimination has been properly claimed; in a prosecution for perjury the materiality of the questions asked is a question of law for the court; and that materiality should appear from the face of the indictment. (R. 22.)

Hoffman v. *United States*, 341 U. S. 479, 489 (1951).

Emspak v. *United States*, 349 U. S. 190, 199 (1955).

Sinclair v. *United States*, 279 U. S. 263, 298 (1929).

United States v. *Orman*, 207 F. 2d 148, 155 (1953).

Markham v. *United States*, 160 U. S. 319, 325 (1895).

Where it appears from the indictment that the questions alleged are not even probably material, the indictment should be dismissed.

United States v. *Garvett*, 35 F. Supp. 644, 646 (1940).

United States v. *Seymour*, 50 F. 2d 930, 940 (1931).

United States v. *Cameron*, 282 Fed. 684, 692 (1922).

Where it is perfectly apparent to the trial judge from the face of the indictment that the questions set forth are irrelevant, the defendant will not be exposed to what would be a "mere ceremony of trial." *United States* v. *Laut*, 17 F. R. D. 31, 36 (S. D. N. Y., 1955).

The District Court found that of the twenty-two questions on which the indictment is based many were so far afield as to require no discussion as they were in no way relevant to the purpose of deportation. (R. 23.) The court in discussing some of the questions determined that they were completely meaningless.

The District Court upheld the constitutionality of the Act but dismissed the indictment for the reason that none of the questions there set forth is relevant to defendant's availability to deportation. (R. 25.)

Point II.

THE INDICTMENT IS IN DEROGATION OF THE FIRST AMENDMENT.

The indictment is in derogation of the First Amendment to the Constitution.

Failure to speak in the present context is not a crime.

The indictment is based on an alleged crime wholly unknown to the common law.

A crime is generally defined as the commission or omission of an act specifically forbidden, or commanded to be done, by law, accompanied by an intent. The intent need not always be present, depending upon the kind and purpose of the law.

To speak falsely on material matters under oath in a judicial proceeding may constitute the crime of perjury.

To speak so as to incite to violence may constitute a crime.

For persons, through speech, to agree upon an unlawful act may be conspiracy.

To refuse to speak under some circumstances, depending upon legislation providing therefor, may be punishable as a contempt of court or of a legislative body. In the former situation, however, there is an inherent right to purge oneself of the contempt, before liability to punishment.

In relation to testifying before a legislative body of the federal government, there is specific legislation defining the scope of that body's proper inquiry.

Title 2, U. S. C. section 192 provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question *pertinent to the question under inquiry*, (emphasis added) shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. As amended June 22, 1938, c. 594, 52 Stat. 942."

Thus it will be seen that a congressional committee, whose right of inquiry has been upheld, is nevertheless limited in scope to that which is "pertinent to the question under inquiry," so that while a witness is being questioned he at least has some area for determination on the basis of pertinency, whether he should answer. The court may subsequently disagree with his judgment, but all doors are not initially closed to him.

Section 1252 (d), however, tells a witness that there

is no periphery to the inquiry. He must answer any absurdity put to him by a subordinate in the Service, or hazard sanctions.

There is no basis in Anglo-Saxon law for such an overweening grasp of power on the part of any official.

1252 (d) requires the appellee "to give information under oath * * * as the Attorney General may deem fit and proper."

It is apparent that the limitation in section 192 quoted above "pertinent to the question under inquiry" makes that section fall within constitutionally permitted commands, whereas the unlimited and uninhibited provision of 1252 (d), "as the Attorney General may deem fit and proper", places that section beyond the scope of constitutionally acceptable legislation.

Here, Congress attempted to create a crime based only on a refusal to speak on any subject at all, "whether or not related to the foregoing, as the Attorney General may deem fit and proper."

Here, no affirmative act is involved, nor is there a failure to act. The defendant has not refused to appear before the Immigration Service in response to its call. It knows where to find him; he comes when he is summoned. The defendant has done no act forbidden by the statute or regulation; he has simply refused to answer those questions which a reasonable person would regard as not being relevant to the issue or to the right of the attorney general to deport.

There is no authority for Congress to make criminal that which is a natural right—to remain silent. On the contrary, the Constitution of the United States and the amendments thereto guarantee the right of privacy.

Congress attempts, through an administrative agency, to propound questions to a defendant, and upon his fail-

ure or refusal to answer, upon whatever grounds, constitutional or otherwise, (the act makes no distinction) without more, an indictment results with possible punishment of fine and imprisonment.

Section 1252 (d) makes no provision for a review of the administrative proceeding to determine the relevance or fairness of the questions propounded, or of the right of a defendant to refuse to answer, whether on constitutional grounds or otherwise. Any questions the Service can conjure up, whether related or not to the deportation of the defendant, whether propounded in good faith or for the express purpose of creating criminal liability, is the springboard, from which the defendant may find himself imprisoned for a year and fined.

Please note (R. 2) "Do you subscribe to the Daily Worker?" "Do you know the editor of Narodni Glasnik?" "Since the order of deportation was entered in your case on June 25, 1953 have you attended any meeting of the Communist Party of the U. S. A.?" "Since the order of supervision was entered on March 4, 1954 have you attended any meeting of any organization other than the singing club?" "Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case, since the order of deportation was entered June 25, 1953?" "• • • have you attended any meetings or lectures at the Peoples Auditorium • • •?" "• • • have you attend.. any meetings or socials at the Chopin Cultural Center • • •?" "Have you attended any movies • • • at the Cinema Annex • • •?"

The foregoing are questions directly concerned with the appellee's right of free speech and lawful assembly which are guaranteed to him by the First Amendment. As to those matters, the right of free speech and freedom of assembly carry with them the correlative right to remain silent as to matters of lawful speech and lawful assembly.

> "Freedom of worship, freedom of speech and freedom of press, and the right of assembly are not the subject of direct constitutional grant. They are, however, constitutionally recognized and confirmed as attributes of liberty incident to all persons under the Constitution and laws of the United States regardless of their citizenship; and, as such, they are secured by the First Amendment against abridgement by the Congress and by the Fourteenth Amendment against deprivation by a state without due process of law."
>
> *Douglas* v. *City of Jeannette, Pa.*, 130 F. 2d 652 (1942), affirmed 63 S. Ct. 877, 319 U. S. 157 (1943).

The First Amendment says that Congress shall make no law abridging freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances. That positive prohibition should find support under all circumstances, but certainly in relation to an inquisition designed to result in punishment not for acts, but for failure to speak. The attorney general or his subordinates may not be permitted to act as a roving grand jury to see what traps it might set for the unwary, "as the Attorney General may deem fit and proper."

Point III.

SECTION 1252 (d) IS VAGUE AND INDEFINITE.

Section 1252 (d) is vague and indefinite in violation of the Fifth Amendment to the Constitution.

A penal statute is to be strictly construed, especially must criminal statutes not known to the common law be strictly construed.

A statute which on its face and as applied is so vague and indefinite, as to permit within its scope, its adminis-

trators and enforcers, to burden, prohibit or make criminal, conduct which is constitutionally permissible and protected, violates the Fifth Amendment.

Winters v. *New York*, 333 U. S. 507 (1948).
Herndon v. *Lowry*, 301 U. S. 242 (1937).
Stromberg v. *California*, 283 U. S. 359 (1931).

Subparagraphs 1, 2, 3 and 4 of section 1252 (d) give the attorney general an undefined latitude to impose written regulations and restrictions on the appellee's conduct and activity and in making criminal their violation is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech [and] is void * * *." *Winters* v. *New York*, 333 U. S. 507, 509 (1948).

An alien, whether deportable or not, while in residence here, is entitled to the guarantees of freedom of speech, press and association, without inquisition by the Immigration Service, as protected by the First Amendment.

Bridges v. *Wixon*, 326 U. S. 135 (1945).
Chew v. *Colding*, 344 U. S. 590, 596 ftn. 5 (1953).

A pending deportation does not make unavailable to aliens guaranties of freedom of speech. *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, reversed on other grounds (C. A. 2d, 1952), 345 U. S. 206 (1953).

We deal here with the validity of a criminal statute. To use the test of *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926), the question is whether this statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." In determining that question the statute must be considered on its face.

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of

> the offense intended to be charged would not serve to validate it. * * * It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."
>
> *Lanzatta* v. *New Jersey*, 306 U. S. 451, 453 (1939).
>
> "The question therefore is not what the indictment charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning." Justice Douglas dissenting in *U. S.* v. *Harriss*, 347 U. S. 612 (1954).

What is meant by "to submit if necessary to medical and psychiatric examination" and who is to determine the necessity? What is meant by giving information "whether or not related to the foregoing as the attorney general may deem fit and proper"? We have heretofore shown the limitless lengths to which this would permit the attorney general or his subordinate to go to demand information. What is meant by "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General"? Again, if there is a legitimate disagreement as to what is "reasonable", does a person have to submit to the hazards and expense of a criminal trial to find out what are "reasonable written restrictions on conduct and activities"?

The language of the statute is so vague and indefinite as to make it impossible for the defendant to ascertain what it is he must or may not do, under criminal penalty, in violation of his rights under the Fifth Amendment.

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the defendant must make such determination at the risk of criminal trial.

"The vice of vagueness in criminal statutes is the

> treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."
>
> *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952).

No unlimited power to interrogate resides in any branch of the government. Unless it is an aid to the proper exercise of some power which the government may constitutionally have, the usurpation of a right to examine may violate one or more of the constitutionally protected rights of the subject of the interrogation. *Quinn* v. *United States*, 349 U. S. 155, 161 (1955). The statutory mandate giving to the attorney general the right to exercise the power "as [he] may deem fit and proper" permits its exercise in areas protected by the First, Fourth and Fifth amendments to the Constitution, as well as areas which are in no way relevant and pertinent, and is therefore void.

U. S. v. *Harriss*, 347 U. S. 612, 617, 631, 632, 634 (1954), concerned the law against lobbying. The District Court dismissed the information on the ground that the law was unconstitutional. The Supreme Court reversed and remanded for further proceedings, and stated "We are not concerned here with the sufficiency of the information as a criminal pleading." Justices Douglas and Black dissented. Justice Jackson dissented in a separate opinion.

Justice Douglas said the following:

> "* * * Here, if we give the words of the Act their ordinary meaning, we do not know what the terminal points are. Judging from the words Congress used, one type of activity which I have enumerated is as much proscribed as another.
>
> The importance of the problem is emphasized by reason of the fact that this legislation is in the domain of the First Amendment. That Amendment provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press;

or the right of the people * * * to petition the government for a redress of grievances.' * * *

The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. *Cf. Pierce* v. *United States*, 314 U. S. 306, 311. Since the act touches on the exercise of the First Amendment rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint."

It is appropriate to quote from Justice Jackson's dissent:

"I agree, of course, that we should make liberal interpretations to save legislative Acts, including penal statutes which punish conduct traditionally recognized as morally 'wrong.' Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such moral basis. * * *

In matters of this nature, it does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms what today the Court excludes. * * * The *ex post facto* provision of our Constitution has not been held to protect the citizen against a retroactive change in decisional law, but it does against such a prejudicial change in legislation. As long as this statute stands on

the books, its vagueness will be a contingent threat to activities which the court today rules out, the contingency being a change of views by the Court as hereafter constituted."

In the case last referred to, the Court announced at the very outset that it was not concerned with the sufficiency of the information as a criminal pleading that its review under the Criminal Appeals Act is limited to a decision on the alleged invalidity of the statute on which the information is based.

In the instant case we are concerned with the invalidity of the statute because of its numerous infirmities, and we believe our argument obviates any necessity for further proceedings on that account.

The opinions of Justices Douglas and Jackson are quoted above because they appear to be particularly apt in relation to the instant indictment, and for the further reason that they state the accepted tests for determining the validity of a penal statute.

Point IV.

THE ACT DEPRIVES APPELLEE OF PROCEDURAL DUE PROCESS.

A. Appellee under the Act is deprived of procedural due process.

Section 1252 (c) came before the U. S. Supreme Court as Section 20 (c) in the case of *United States* v. *Spector*, 343 U. S. 169, 172, 177, 180 (1952). It will be profitable to refer to that decision. The majority of the Court did not consider whether the statute on its face constituted a denial of procedural due process by not affording a defendant an "opportunity to have the court which tries him pass on the validity of the order of deportation" for the reason

that "[t]hat question was neither raised by the appellee nor briefed nor argued here. If it had been we might consider it. * * * That question is not foreclosed by this opinion."

Justice Jackson, in his dissenting opinion said that the statute "creates a crime * * * based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure."

Mr. Justice Jackson, speaking in dissent with the concurrence of Justice Frankfurter, characterized the Court's omission to treat the procedural due process aspects of the statute as follows:

> "The Court intimates that it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel."

Mr. Justice Jackson with the concurrence of Justices Frankfurter and Black considered the statute on its face to be unconstitutional, relying upon *Wong Wing* v. *United States*, 163 U. S. 228 (1896) as follows:

> "The Act does not permit the court which tries [the alien] for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted."

Mr. Justice Black speaks at page 174, ftn. 2 as follows:

> "My belief that the statute is void for vagueness makes it unnecessary for me to reach the constitutional question discussed by Mr. Justice Jackson, although I have not yet seen a satisfactory reason for rejecting his view. See my opinion in *Maggio* v. *Zeitz*, 333 U. S. 56, 78-81."

The section under discussion in the instant indictment, 1252 (d) creates a crime analogous to that in the *Spector* case, Section 1252 (e). (1) There is an outstanding order of deportation; (2) There is alleged to be a wilful failure to comply with regulations and restrictions imposed by the attorney general. Here again the act does "not permit the court which tries the alien for this crime to pass on the illegality of his presence."

Here too, "the production of an outstanding administrative order for [the alien's] deportation becomes conclusive evidence of his unlawful presence" and the "consequent" duty to comply with the regulations and restrictions upon his conduct.

Section 1252 (d) does not permit "inquiry into the correctness or validity of the order." Again "a deportation order is made to carry potential criminal consequences" and the administrative decision on the issue of unlawful presence is made "conclusive upon the criminal trial court" thus permitting this "vital element" of the crime to be established without a jury trial. (*United States* v. *Spector*, 348 U. S. 169 (1952).)

"It is our duty before reversing a judgment to examine any ground upon which it can be sustained, even a ground which the court below may have overlooked or expressly rejected."

Justice Jackson in *United States* v. *Spector*, 343 U. S. 169, 180 (1952).

The statute, on its face, sanctioning such procedure, is unconstitutional as a violation of the Fifth Amendment.

B. The statute is also repugnant to the Sixth Amendment.

Assume an alien is ordered deported for having been found guilty of crimes involving moral turpitude. Assume further he is placed on trial under section 1252 (d). The government will be permitted to introduce into evidence

a certified copy of the order of deportation as the basis for the present prosecution. A material fact which a criminal trial requires be established beyond a reasonable doubt would be established by a piece of paper. As to that material fact the defendant would be denied the right to confront and cross-examine the witnesses against him and the jury would have no opportunity to consider that vital, material part of the crime charged.

Another related vice that is inherent in the statute is that under its provisions, a determination of the existence of a material fact by an administrative hearing which is a civil proceeding, is *res judicata* in a subsequent criminal action. The statute is in conflict with the rule that a material fact in a criminal case may not be proved by introducing in evidence a judgment that was rendered against the accused in a civil action where that fact was in issue. (30 American Jurisprudence, page 1006, Judgments, section 295.) Conversely, the rule is that a judgment of acquittal in a criminal case is not *res judicata* as to any fact alleged in the indictment, in a subsequent deportation proceeding against the defendant. (*Lewis* v. *Frick*, 233 U. S. 291, 301, 302 (1914)).

Point V.

BILL OF ATTAINDER AND EX POST FACTO LAW.

One of the grounds for deportation in the Act is that an alien has been found to be a member of a group which is now the subject of deportation. If the order of deportation against the appellee is that he had been after entry a member of a specified group, the Act under which the defendant has been found deportable obviously makes deportable members of an easily identifiable class, and becomes by legislative fiat, a bill of attainder. (*U. S.* v. *Lovett*, 328 U. S. 303 (1946).)

Section 9 of Article I of the Constitution provides that no *ex post facto* law shall be passed. Here, under 1252 (d) penalties are provided in addition to deportation.

In *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951), Mr. Chief Justice Vinson said, at page 230:

> "This court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law."

That the statute is an *ex post facto* law is made plain by the definition of such a law by the Supreme Court in *Burgess* v. *Salmon*, 97 U. S. 381, 384 (1878), where the Court said:

> "An *ex post facto* law is one which imposes a punishment for an act that was not punishable at the time it was committed, or a punishment in addition to that then prescribed."

See also *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937).

Point VI.

Section A.

DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS.

Section 1252 (d) on its face and as applied, deprives appellee of liberty without due process of law in violation of the Fifth Amendment to the Constitution.

Aliens, except for liability to deportation, are entitled as a matter of constitutional right to all civil rights and liberties accorded to citizens.

Bridges v. *Wixon*, 326 U. S. 135 (1945).
Chew v. *Colding*, 344 U. S. 590, 596 ftn. 5 (1953).

The power to expel aliens deemed undesirable cannot

be used to deprive them of these liberties and property rights without due process of law.

United States ex rel. Ross v. *Wallis*, 279 Fed. 401, 403 (C. C. A. 2d, 1922).

Petition of Brooks, 5 F. 2d 238, 239 (D. C. D. Mass. 1925).

The power to hold in custody or otherwise restrict the liberty of deportable aliens, without judicial trial, has been permitted only as an incident to the power to deport or exclude, pending deportation proceedings, and "while arrangements were being made for their deportation". *Wong Wing* v. *United States*, 163 U. S. 228 (1896.)

This discussion is necessary in considering the so-called supervisory parole regulations read by the Service to the appellee which will be found in the transcript of record on pages 28 to 31 inclusive. This regulation is pursuant to section 1252 (d).

In *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, 967 (1952) the Court of Appeals for the Second Circuit said as follows:

> "But the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty. See Walker vs. Chief Quarantine Officer, D. C. Canal Zone, 69 F. Supp. 980. And unless accompanied by those indicia of legal procedure that are embedded in the constitution as the right of all men * * * such confinement must violate the Fifth Amendment. * * * But where * * * confinement is no longer justifiable as a means to effectuate removal elsewhere, then liberty as such is at stake and the mandate of due process of law may be invoked by all, 'whether citizens, aliens, alien enemies or enemy belligerents.' Rutledge, J., dissenting in Re Yamashita, 327 U. S. 1, 41, 42."

The decision was reversed as inapplicable to an excludable alien as distinguished from a deportable alien, but since the appellee can only be deported (he is not excludable) the language of the decision is appropriate.

Section 1252 (d) fixes the period during which the attorney general may hold an undesirable alien in confinement while arranging for his actual deportation. If he has not arranged for or effectuated the alien's removal within six months after a final administrative order of deportation has been made, his power to detain the alien ends, and the alien must be given his freedom. See *United States ex rel. Kusman* v. *Shaughnessy*, 117 F. Supp. 541, 544-45 (D. C. S. D. N. Y. 1953), *United States ex rel Blankenstein v. Shaughnessy*, 117 F. Supp 699, 701, 703 (D. C. S. D. N. Y. 1953).

The courts have generally held that custody, whether by direct physical detention or by other control, pending actual deportation, which exceeds four to six months, constitutes an unreasonable and therefore an unlawful restraint. *U. S. ex rel. Ross* v. *Wallis*, 279 F. 401 (C. C. A. 2d, 1922), *Petition of Brooks*, 5 F. 2d 238 (D. C. Mass. 1925), *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C. C. A. 9th, 1931), *United States ex rel. Dzuro* v. *District Director*, 102 F. Supp. 704 (D. C. S. D. N. Y. 1951).

Section 1252 (d) however, purports to extend authority to exercise powers, normally incidental to deportation, even after the power to physically deport cannot be carried out. The section attempts to authorize the attorney general to supervise and impose conditions and restrictions upon the life and liberty of those aliens whose removal from the country has been ordered but cannot be effectuated for an unlimited and unknown period of time after the power to detain to "make arrangements" for deportation has ended. *Carlson* v. *Landon*, 342 U. S. 524

(1952). *Cf. Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 215 (1953), where *Carlson* v. *Landon*, heavily relied on by appellant, is interpreted by Mr. Justice Clark, writing for the Court, as applying to "resident aliens temporarily detained pending expeditious consummation of deportation proceedings * * *."

In *Wong Wing* v. *United States*, 163 U. S. 228 (1896), the court determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and therefore, constituted a violation of the Fifth Amendment.

The reasoning of the court is applicable to section 1252 (d). This section similarly seeks, without judicial trial, to deprive aliens of liberty by subjecting them to supervision which does and may further circumscribe their movements, restrict and impair their normal living and their right to work, for an unlimited period of time, conceivably as long as they may live, or until their departure from the United States can be effected. This procedure cannot possibly be equated to an incident of deportation. It is deliberate harassment and punishment for remaining within the confines of the United States because no other country will accept the individual.

Liberty is not restricted to mere absence of imprisonment. In *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954), the Supreme Court said:

> "Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * *"

See also

Williams v. *Fears*, 179 U. S. 270, 274 (1900).
Allgeyer v. *Louisiana*, 165 U. S. 578, 589 (1897).
Bauer v. *Acheson*, 106 F. Supp. 445, 450 (D. C. D. C. 1952).

Circuit Judge Anderson in *Petition of Brooks*, 5 F. 2d 238, 239, 240 (1925), sharply and unequivocally enunciated the proposition that the power to deport does not as well include the right without judicial trial, to restrict and impair freedom and liberty although short of actual imprisonment. In that case, too, the order of deportation could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge Anderson rejected this contention, saying:

> "He is entitled to be deported, or to have his freedom. * * * any further detention by the immigration authorities or control of [the alien's] freedom is illegal."

The conditions circumscribing and restricting the freedom of the defendant authorized by the statute and imposed by regulations are such a control of his freedom as to render the statute and the regulations illegal.

The statute attempting to give authority to the attorney general to supervise the lawful conduct of the appellee and to determine what he may or may not do, with whom he may or may not associate, when and how often he is to report, when and how often he is to be examined physically or psychiatrically, is a plain interference with the protected rights of a resident alien.

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the Constitution."
>
> *Williams* v. *Fears*, 179 U. S. 270, 274 (1900).

Section 1252 (d) violates the Fifth Amendment since the restrictions on the defendant's liberty are imposed without due process of law, and by administrative fiat only.

> • • • "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."
>
> *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939).

Judged by the foregoing test, no amount of judicial interpretation can make Section 1252 (d) palatable constitutionally.

Point VI.

Section B.

THE STATUTE IS REPUGNANT TO THE TENTH AMENDMENT.

The statute under which the defendant was indicted is repugnant to the Tenth Amendment. It was not enacted under any power granted to Congress, it trenches upon the police powers of the several states.

The power to regulate naturalization and by implication, immigration and deportation, derives from, and is co-extensive with, the power of the United States as a sovereign nation, and the powers granted to Congress by section 8 of Article I of the Constitution "To regulate Commerce with foreign Nations," "To establish an uniform Rule of Naturalization", and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Power expressly granted to regulate naturalization and

to make all necessary and proper laws for carrying it into execution, includes, by implication, power to create such means as are necessary and proper for executing the granted power, *e.g.*, to establish an administrative agency, prescribe its mode of procedure, and its authority, to deport, to take the deportee into temporary custody; and further, to provide such measures as shall be necessary and proper for the enforcement of all such laws.

The statute subjects an alien who wilfully fails to "give information under oath * * * as the Attorney General may deem fit and proper", to fine and imprisonment. It was not enacted under the implied power of Congress over deportation, as it obviously applies only to an alien who is not then deportable. The question then is, whether it is such a measure as is necessary and proper for carrying into execution the power of Congress over naturalization. Subject to the inhibitions contained in the First and Fifth Amendments, Congress may make such laws as it deems necessary and proper for carrying that power into execution.

The words "necessary and proper" in the last clause of Section 8, Article I of the Constitution are words of limitation and prescribe the areas of legislative power. Within the bounds of that area, the power of Congress to legislate is unfettered and supreme, but congressional legislation which strays beyond the bounds of what is necessary and proper is unauthorized and unconstitutional, and as ineffective as if it had not been enacted. As said in *Linder* v. *United States*, 268 U. S. 5, 22 (1925), "Federal power is delegated, and its prescribed limits must not be transcended even though the end seem desirable." See *United States* v. *Butler*, 297 U. S. 1, 68-69 (1936) where Mr. Justice Roberts stated:

> "It is an established principle that the attainment of a prohibited end may not be accomplished under

> the pretext of the exertion of powers which are granted. * * * And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

Is criminal punishment as provided by section 1252 (d) necessary and proper for carrying into execution the power entrusted to Congress to regulate naturalization, and by implication, deportation? The statute, to be within bounds prescribed by the words *necessary and proper* must be appropriate, and "really calculated to effect * * * the objects entrusted to the government," since "Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or *because they make the government stronger.* There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution." (Emphasis added.) *Legal Tender Cases,* 12 Wall. (79 U. S.) 457, 542-543 (1872).

The means which the statute provides for carrying into execution the delegated power must be "appropriate and needful" *Oklahoma* v. *Atkinson,* 313 U. S. 508, 526 (1941); and must "have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934).

In view of these decisions of this Court defining the term "necessary and proper", can it be said that the imposition of the supervision provided by the statute resulting in criminal penalty for its breach is necessary and proper for carrying into execution the power of Congress to regulate naturalization and deportation? Is the imposi-

tion of such restrictions an "appropriate and needful" means for carrying out the power to deport? These questions must be answered in the negative. There is a "necessity" for supervision, according to the government, only because deportation *cannot* be effected. The broad and unrestricted power of the attorney general to require information as he "may deem fit and proper" to be exercised by him when deportation is impossible, about subjects unrelated to deportation, cannot be "appropriate and needful" to deportation. The "power to deport" is itself an implied power from the constitutional power over "naturalization", and, as such implied power, should be strictly construed.

The statute does nothing more than impose a penalty, a penalty of restriction of freedom and imposition of inquisition because of "the inability of this Government to carry out its policy to rid the country of their presence in conformity with law," (Appellant's jurisdictional statement p. 9), with the added possibility of criminal sanctions upon breach of the all encompassing and vague provisions of the statute. The effect of such criminal penalties is to postpone rather than encourage deportation. It is clear that the imposition of such penalties is neither necessary nor proper for carrying into execution any of the powers delegated to Congress, and therefore contravenes the Tenth Amendment.

The government argues: "If, as must be conceded, Congress has the power to expel him from the country entirely, it must have the power to deal with the situation presented by the inability to effectuate deportation." (Appellant's main brief, page 33.) No authority is cited for the proposition that the government "must" have such power. As previously pointed out, the government can have only powers necessary and proper to the "power to expel". The government further argues that because

citizens may be called into the armed forces of the nation, "involving for such citizens grave impact upon their customary liberties, it is not unreasonable to provide for supervision of aliens whose past record discloses a contribution to the source of the current danger." (Appellant's main brief at page 35.) As indicated at page 2 of this brief, the record is bare of any evidence or allegation of this alien's "past".

It is, of course, inappropriate to compare supervision of a deportable alien with service in the armed forces of one's country, which is considered a public service. It is otherwise inapt because whereas induction into the armed forces is clearly "necessary and proper" "to raise and support Armies" and "to declare War", powers specifically given to Congress by the Constitution, supervision of an alien, not presently deportable, is not "necessary and proper" to carrying out the constitutionally implied power to deport.

In *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 13-14 (1955), this court considered whether Congress had overreached in enacting a law providing that "termination" of military service would not relieve a person of trial by court martial for certain offenses committed while a member of the armed forces. The Court found that such an Act "cannot be sustained on the constitutional power of Congress 'to raise and support Armies,' 'To declare War,' or to punish 'Offenses against the Law of Nations.' And this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law. See *Ex Parte Mulligan*, 4 Wall. 2, 124-127. The Government's contention is that the Act is a valid exercise of the power granted Congress in Article I of the Constitution 'To make Rules for the Government and Regulations of the land and naval Forces' as supplemented by the Necessary and Proper clause." (Reference to footnotes omitted.)

After indicating the differences between military tribunals and federal courts, the Court said at page 17: "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."

The Court found the law unconstitutional for the foregoing reasons, among others.

The government argues that the constitutional power to expel "must" carry with it a power to "supervise". Just as "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise" it is the primary business of the government in relation to its implied power to deport, to deport or be ready to deport should the occasion arise. Supervision, as required by Section 1252 (d) is not even "incidental" to such power to deport. It is likewise true that "to the extent that those responsible for performance of this primary function are diverted from it by the necessity" of supervision, the basic purpose, "to deport", is not served.

If Congress, under its power to regulate naturalization may subject aliens in this country to criminal penalties, although the imposition of such penalties is neither necessary or proper for carrying such power into execution, then, as said in *Keller* v. *United States*, 213 U. S. 138, 148 (1909), "[A]n immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them."

In *Hines* v. *Davidowitz*, 312 U. S. 52, 76 (1941), Mr. Justice Stone, in a dissenting opinion, stated the following well

established principle of law: "The national government has exclusive control over the admission of aliens into the United States but, after entry, an alien resident within a state, like a citizen, is subject to the police powers of the state * * *." See also *House* v. *Mayes*, 219 U. S. 270, 282 (1911), where Mr. Justice Harlan, speaking for the court said:

> "* * * power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good * * *."

See *United States* v. *Butler*, 297 U. S. 68-69 (1936).

It has already been pointed out that the states have adequately provided legislation covering any possible danger arising out of criminal activities of the alien during his continued residence. For the Congress to "supervise" a resident alien as provided in section 1252 (d) transgresses the power reserved to the states by the Tenth Amendment, and not being a "necessary and proper" incident to the implied power to deport, is unconstitutional and void.

Point VII.

PUNISHMENT INFLICTED IN VIOLATION OF THE FIFTH AMENDMENT.

Section 1252 (d) on its face and as applied inflicts punishment on the defendant in violation of the Fifth Amendment to the United States Constitution.

In *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, 320 (1866) the proposition was established that "the deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact."

Here the defendant has not been or cannot be deported. The power to "supervise" granted by section 1252 (d) has no reasonable relation to the exercise of any of the powers which Congress may exercise over deportation and the deportable alien.

Supervision is intended to be punitive. An analogy with the *Cummings* case will illustrate that point. The oath in the *Cummings* case "was required to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." *Cf.* Appellant's jurisdictional statement at page 9, where H. Rep. 1192, page 10, is quoted for the rationale behind this legislation: "The committee feels that aliens illegally here are not necessarily entitled to enjoy precisely the same privileges as those who are lawfully resident, merely because of the inability of this Government to carry out its policy to rid the country of their presence in conformity with law."

1252 (d) was not intended to be directed at control of the defendant pending the conclusion of deportation proceedings. It does not become applicable until six months after the final conclusion of the deportation proceeding. It is not a temporary control while arrangements are being made for deportation. It is precisely because deportation cannot be effected within the prior six months that 1252 (d) enters the act. And from that moment deprivations and restrictions are exercised, many of which could not have been exercised during the initial six month period.

Out of frustration and a desire to punish, regulations are promulgated, questions as to conduct, association are propounded, medical and psychiatric examination may be demanded, as well as information whether relevant or not, and restrictions placed on the lawful conduct and lawful associations of the defendant.

These conditions establish, as a substitute for the jail to which the defendant may not be sent, a system of police surveillance that differs only in degree, but not in kind from imprisonment.

The government practically makes such an admission in its brief. (page 35.) The government argues that the defendant belongs to a special class. It says at page 35: "The limited supervisory precautions taken with respect to him, to the restricted extent that they may affect his liberty, are justified by his special position in our society and the counterbalancing necessity to prevent or at least warn of further conduct harmful to the United States." The laws of the United States know of no special classes, but the Congress has attempted to create a special class of those persons whom it cannot deport, and to make their enforced stay here as painful as possible.

The attorney general has practically complete control of the appellee. He sends for him and he comes at once.

He asks questions and the appellee answers those which he believes it pertinent that he answer. He has been restricted in his movements to fifty miles from Chicago (R. 30), and he has abided by that restriction. He has been told to make application to some country for admittance — he has done so, but thus far no other country has agreed to accept him. (R. 49, 50.)

Now he has been indicted for failing or refusing to answer questions. (See R. 2.) The questions consist generally of whether he visited certain places, whether he knows certain editors or individuals, without indicating any particular significance in relation to those individuals, whether he has attended any meetings or moving pictures, whether he has addressed lodges, whether he has distributed leaflets, whether he is a member of certain organizations including the communist party.

Apparently, the government in its brief has abandoned, as it should have, any argument on all the questions save two. The government insists that it has a right to answers to the following (Appellant's main brief, page 29):

"1. Since the order of deportation was entered in your case on June 25, 1953, have you attended any meeting of the Communist Party of the U. S. A.?

2. Are you now a member of the Communist Party of the U. S. A.?"

It is for failure to answer these two questions that the appellee should be punished by imprisonment.

Suppose the appellee had refused to answer the questions relying on the Fifth Amendment? How would the attorney general have been helped in his supervision of the appellee. What additional information would that have given him as to the activities of the appellee? Or does the attorney general take the position that even if the appellee had relied on the Fifth Amendment he would

still be subject to indictment? What could the attorney general have done to correct the conduct of the appellee or to save the nation from the results of the appellee's "evil" associations or "evil" thought with or without the answers to the two questions? As the District Court said, "the Attorney General is powerless to take any further action even if [his prior undesirable activities] are continuing." (R. 19.)

Arguendo, suppose the appellee had admitted that he was still a member of the communist party and that he still attended meetings of the communist party? Would that knowledge coming directly to the attorney general from the appellee give the attorney general any greater or additional rights than he already had?

Section 4 (f) of the Internal Security Act (50 U. S. C. 783 (f)) provides: "Neither the holding of office nor membership in any communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or *of any other criminal statute.*" (Emphasis added.)

Suppose the appellee answered in the affirmative all questions regarding persons he knew, the moving pictures he saw, the newspapers he read, including the Chicago Tribune and the Daily Worker (and he was asked and refused to answer whether he read the Chicago Tribune), the meetings he attended and addressed; suppose the appellee, throwing his rights to the wind, bared his soul, and told all of his uneventful and insignificant life's story from the cradle to the present, how would the attorney general be aided in his supervision of the appellee? Would that in any way at all help effect the appellee's deportation? The government tried to deport him during the first six months after he was declared deportable, and since, and thus far, over a period of three and one-half years, the government has found no haven for him. If the appellee

confessed that he knew Tom Jones or Joseph Smith would that be of any assistance to the attorney general in deporting him?

It is absurd for the government to take the position that this information, for whatever it is worth, is necessary to the attorney general for purposes of deportation. Certainly on the question of membership in the communist party, the government with its all pervading Federal Bureau of Investigation doesn't need any help from this appellee as to his activities. They know who he is, what he does and where they can find him every minute of every day.

The real purpose of the questions and the penalties to be imposed for failure to answer is to divest the appellee of whatever feeling of freedom he might otherwise have left to himself. The purpose is not security for the nation.

To equate this so-called supervision with restrictions placed upon the armed forces is to attempt an analogy that has no basis in fact or logic. The members of the armed forces have at least the status of citizenship or potential citizenship. The appellee has been ordered out of the country and is still here only because there is no place to which he can go. The restrictions on the citizen as a member of the armed forces are pertinent to the maintenance of an army. The so-called supervision desired to be exercised over the appellee has no relationship or relevancy to his deportation.

The attorney general may indict and punish the appellee for any of dozens of violations of federal laws, and the appellee may be indicted and punished for infractions of the criminal laws of 48 states. That provides the ultimate in supervision. The appellee registers as an alien each year [8 U. S. C. Section 1302]; he reports to the Service at regular intervals. For all he knows the

Service has its agents watching and reporting on him. Thus far there is no record that he has been found to have violated any laws.

An innocent purpose cannot be attributed to the regulations. They are not needed to insure the deportation of the appellee. The fact that questions were propounded to the defendant which it is alleged he refused to answer, proves he responded when called. The indictment does not charge him with refusal to respond to the call of the Service, but on the contrary alleges that he did respond (R. 1).

To control the activities, associations, the reading of the appellee, to require him to submit to mental and physical examination, to conform to restrictions as to the reasonableness of which there may well be legitimate disagreement, all these are punishment inflicted without due process of law and solely by administrative fiat, and renders section 1252 (d) violative of the Fifth Amendment.

Point VIII.

APPELLEE IS DEPRIVED OF EQUAL PROTECTION OF THE LAW.

Section 1252 (d) deprives the appellee of the equal protection of the laws in violation of the Fifth Amendment to the Constitution.

Yick Wo v. *Hopkins*, 118 U. S. 356 (1886), has settled that the guarantee of equal protection of laws extends not only to citizens but to aliens as well.

The due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations.

Detroit Bank v. *United States*, 317 U. S. 329 (1943).

Hirabayashi v. *United States*, 320 U. S. 81 (1943).

Carleton Screw Products Co. v. *Fleming*, 126 F. 2d 537 (C. C. A. 8th, 1942), cert. den. 317 U. S. 634 (1942).

Pfeiffer Brewing Co. v. *Bowles*, 146 F. 2d 1006 (Em. Ct. App. 1945), cert. den. 324 U. S. 865 (1945).

Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson* v. *Landon*, 342 U. S. 524, 534 (1952). The power to detain, or instead, to impose regulations on conduct to insure deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon*, 342 U. S. 524 (1952.)

Where the power to deport ceases or is rendered ineffectual, however, after the six-month period prescribed by statute, constitutional authority to exercise the powers of 1252 (d) over the alien incidental to deportation terminate.

By the terms of section 1252 itself, the authority to detain or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation.

The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is resident in the United States, until such time as he can be deported, and he is entitled to the rights guaranteed by the Constitution to all people within our borders.

The conditions imposed by 1252 (d) are not and can-

not be prescribed for a citizen. The added burdens imposed by this section on its face and as applied here are patently, by reason of alienage alone. Therefore, this section, and the regulations promulgated thereunder, deprive the appellee of the equal protection of the laws.

Point IX.

UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

Section 1252 (d) unlawfully delegates legislative power to the attorney general. His application thereof is a usurpation of legislative power in violation of Article I, Section 1 of the United States Constitution.

The alien is given over to the supervision of the attorney general under regulations prescribed by him.

For such a delegation of power to be constitutionally valid the statute must declare a guiding "policy" or establist a "rule" or "an intelligible principle" or such policy, rule or principle, must be found in the "purpose of the act, its factual background and the statutory context in which they appear."

United States ex rel. Knauff v. *Shaughnessy*, 338 U. S. 537, 543 (1950).

Lichter v. *United States*, 334 U. S. 742, 785 (1948).

American Power & Light Co. v. *Securities & Exchange Commission*, 329 U. S. 90, 104-5 (1946).

Schechter Poultry Corporation v. *United States*, 295 U. S. 495 (1935).

Panama Refining Co. v. *Ryan*, 293 U. S. 388 (1935).

Sub-section 4 of 1252 (d) establishes no policy, rule or principle to limit or guide the attorney general in framing regulations. The sub-section requires an alien to "conform to such reasonable written restrictions on his con-

duct and activity as are prescribed by the attorney general." It therefore invests the attorney general with an unlimited and undefined power not only to regulate beyond the specific prescription of subsections 1, 2 and 3, but as to any other matter he may choose.

Subsection 3 requires the alien to give "such other information whether or not related to the foregoing, as the attorney general may deem fit and proper." As the attorney general states, the language of the statute is of "eloquent breadth." (Appellant's main brief, page 15.) It grants the attorney general a roving commission to demand information of any sort—it is a star chamber inquisition. Nothing is sacred as far as the alien is concerned. No recess of his mind, no idea, no belief, no thought, no business, political or personal activity is free from the probe of the attorney general or the numerous assistants in his service. The alien is denied his right of privacy, a cherished possession in the opinion of the founding fathers, and one which the law guarantees to aliens and citizens alike.

By virtue of the delegation granted by section 1252 (d) to control the lives and restrict the liberty of the alien, the attorney general has been given a free hand. By virtue of the criminal penalty provided in the section, the attorney general has been given power to legislate a series of crimes for conduct or activity which is not otherwise criminal, and cannot be criminal, and cannot be made so by the Act.

All of the foregoing should give added weight to the argument on behalf of the appellee that he is protected by the First Amendment to the Constitution and that by invoking the First Amendment that should be sufficient to justify his refusal to answer the questions set forth in the indictment.

"Implied authority in an executive officer or department

to repeal, extend or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter*, 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Canners Corporation*, 315 U. S. 475, 489 (1942).

It is believed that the following quotation from Justice Black's dissent in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 217-218 (1953), is particularly appropriate here:

> "No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. * * * Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man' imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.'"

Point X.

THE INDICTMENT IS INSUFFICIENT TO CHARGE AN OFFENSE.

We have shown, we believe, that the statute under which the indictment is drawn is constitutionally defective. Assuming, *arguendo*, that the statute meets constitutional tests, the indictment nevertheless is insufficient to charge a crime.

The statute does not subject to punishment any alien against whom an order of deportation is outstanding, but only an "alien against whom an order of deportation is outstanding" under a particular statute or portion of the statute. Hence, the indictment, to bring the appellee within the reach of the statute, must charge that the outstanding order of deportation was made under a particular statute. The indictment makes no such charge. The indictment charges that the defendant "is an alien against whom an order of deportation theretofore had issued and been outstanding more than six months," etc. So much of the charge may be true, but the order of deportation may be one that is outstanding against the defendant under another statute in which case the defendant would not be punishable under section 1252 (d).

The applicable rule in this case is concisely stated in Joyce on Indictments (2d ed. 1924) sec. 285 at page 316, where it is said: "[t]he sufficiency of an indictment depends on whether the facts there alleged can be true and the defendant yet be innocent of the offense intended to be charged."

Failure to charge a fact or circumstance in the absence of which there cannot be a crime under the statute which created the crime, renders the indictment fatally defective.

There are other necessary allegations missing from the indictment which render the indictment fatally defective, in whatever form the statute might be drawn, and we have called attention to these insufficiencies in our motions to dismiss. (R. 4 and 5.)

The indictment would not be sufficient to constitute an offense unless it alleged each of the following matters:

1. The nature of the act which rendered the appellee deportable.
2. The entry of an order of deportation under the particular statute involved.

3. Knowledge by the defendant of the entry of the order of deportation and of the contents thereof.

4. The order of deportation itself, and that it was entered after a hearing pursuant to the terms of the statute.

Unless these facts are alleged in the indictment, conviction of the accused cannot be had under the Constitution and the laws relating to crime.

None of the foregoing facts may be inferred—they have to be charged in the indictment. The applicable rule is stated in *United States* v. *Hess*, 124 U. S. 483, 486 (1888), in the following language:

> "[t]he universal rule, on the subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."

Other authorities on the present subject will be found in *United States* v. *Weber*, 71 F. Supp. 88, 90 (1947). The word "willfully" in the statute requires an allegation of all such facts which if unknown to him would not subject him to the punishment which the statute prescribed.

In *United States* v. *Carll*, 105 U. S. 611 (1881), the indictment charged that the defendant "feloniously, and with intent to defraud" a certain named bank, "did pass, utter and publish upon and to said bank certain falsely made, forged, counterfeited and altered obligations of the United States" but the indictment failed to charge that the defendant, at the time he uttered these obligations, had knowledge of their character. The defendant was convicted by a jury "under instructions which required them to be satisfied of the facts alleged, and that the defendant, at the time of

uttering the obligations, knew them to be false, forged and counterfeited and altered." The Supreme Court held that knowledge may not be inferred, and that the failure of the indictment to charge that the defendant had knowledge of the character of the obligations was a fatal defect which was not cured by the instructions to the jury, and that the objection to the indictment was properly raised by a motion in arrest of judgment.

CONCLUSION.

It is the belief of counsel that never since the early history of our country has the Congress adopted an Act as punitive and as opposed to American concepts of decency and the Bill of Rights, as is the present Immigration & Nationality Act.

Thomas Jefferson, in a letter to James Madison, datelined Paris, March 17, 1789 wrote: "The tyranny of legislatures is the most formidable dread at present and will be for many years." (H. A. Washington, The Writings of Thomas Jefferson, Vol. 3, page 5.)

We respectfully urge the court to affirm the judgment of the court below and to express its views on the constitutional issues raised here.

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December 27, 1956.